Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

G.K.A. BEVERAGE CORP., STATEN ISLAND BEVERAGE CORP., CLOVER BEVERAGE DIST. CORP.; PRINCE BEVERAGE DIST. CORPORATION; GICCI BEVERAGE CORPORATION; V. IOCOLANO DISTRIBUTION CORPORATION; R-KET CORPORATION; P. LAUTAO CORPORATION; VIN-MARE DISTRIBUTION CORPORATION, MANUEL NIEVES LIMITED, VINCENT LAUTATO CORPORATION, ROCKVILLE DISTRIBUTION CORPORATION, LYNVEY BEVERAGE CORPORATION, PA DISTRIBUTION CORPORATION, STARLITE BEVERAGE CORPORATION, 396 6TH AVENUE SYSTEMS CORP., RAPITZ BEVERAGE CORPORATION, RINDA BEVERAGE CORPORATION, R&E WOLDERICH CORPORATION, WINDY HILLS CORPORATION, VICTORIA HEIGHTS CORPORATION, DOMINO BEVERAGE CORPORATION, WESTERLEIGH BEVERAGE CORPORATION, QUINCO BEVERAGE CORPORATION, RODAN BEVERAGE CORPORATION, KARE-FRE BEVERAGE CORPORATION, BY SUM BEVERAGE CORPORATION, BREIT DISTRIBUTION CORPORATION, TITAN BEVERAGE CORPORATION, LUNDON BEVERAGE DISTRIBUTION CORPORATION, EL-LEN BEVERAGE CORPORATION,

(For Continuation Of Caption See Reverse Side Of Cover)

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioners,

-against-

HAROLD HONICKMAN, DR. PEPPER SEVEN-UP COMPANIES, INC., DR. PEPPER/SEVEN-UP CORPORATION and LANCE T. FUNSTON,

Respondents.

QUESTIONS PRESENTED

1. Can one of two targets of an antitrust conspiracy sue as plaintiff to vindicate the harm to it when the other target fails to act because it is a participant in that conspiracy or, does such a plaintiff suffer only derivative injury, such that it lacks standing, solely because the plaintiff is a distributor while the other target is a manufacturer?

2. Do exclusive distributors of soft drinks with a vested interest in the brands made by the bottler and who were also one of the two targets of the anticompetitive conduct, suffer sufficient direct antitrust injury such that they have standing to assert a violation of the antitrust laws?

3. Is there a per se rule of legality under federal antitrust law, such that a two-tiered monopolist, who exacts profit as a manufacturer at the first tier, may as a matter of law, be exempt from a violation of Sherman 2, solely on the Chicago School theory that a two-tier monopolist would not profit from activities at the second tier (where the plaintiffs do business). Can that economic assumption be made in favor of such a monopolist at the pleading stage of a proceeding prior to an answer or any discovery?

4. Will a common law interference with contract count be dismissed when the defendant achieved its goal by the intentional destruction of the plaintiff's sole source of supply with which said plaintiff had an exclusive contract?

PARTIES TO THE PROCEEDINGS

Petitioners are the parties listed in the caption namely all of the distributors of the Seven-Up and independent brands formerly supplied by Brooklyn Seven-Up Bottling Company. Petitioners are all of the plaintiffs-appellants below. Respondents are Harold Honickman, Lance Funston, Dr. Pepper Seven-Up Companies, Inc., and Dr. Pepper/Seven-Up Corporation.

RULE 29.1 STATEMENT

Petitioners have no parent, subsidiary or affiliated corporations.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 55 F.3d 762 (2 Cir. 1995) and reprinted in the Appendix at A1. The opinion of the district court is unreported and is reprinted at A3.

JURISDICTION

Petitioner filed suit in the United States District Court for the Eastern District of New York under 28 U.S.C. 1331, 1332, 1337 and principles of pendent jurisdiction; alleging diversity and federal question bases for jurisdiction. The District Court granted a motion to dismiss on February 14, 1994 and the petitioner noticed a timely appeal under 28 U.S.C. 1291 on February 18, 1994. The judgment of the Court of Appeals was entered on June 2, 1995. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

These are set forth in the Appendix at A91.

STATEMENT OF THE CASE

Procedural History

The Court of Appeals for the Second Circuit affirmed the granting of a 12(b)(6) motion to dismiss which had been granted before any defendant answered and without any discovery into the merits of the case. The Court of Appeals based the affirmance solely on the fact that the Petitioners "lacked antitrust standing." A10. The District Court had dismissed on the additional alternative ground that the action was barred by res judicata. A29. Both courts went on to conclude that petitioners could not succeed under the additional counts of interference with contract and interference with prospective contractual relations and dismissed those as well. Finally, both courts treated the last count, for violation of the New York's antitrust statute (N.Y. Gen. Bus. L. 340) as being the same as those under the Sherman Act and dismissed – leaving plaintiffs with no remedy for a truly remarkable scheme, the successful object of which was to destroy their businesses.

The Market

The soft drink market in New York City and environs is dominated by two organizations, Coca Cola and Pepsi. Today, as averred in the complaint, the two together control 95 percent of the soft drink market. A6. Defendant Honickman now owns and controls Pepsi, Canada Dry, Seven-Up and all national brands (other than Coca Cola's line), as well as almost every private label brand sold by the supermarkets and chain stores. The Honickman share of the market, including Seven-Up, was averred in the

complaint to be at least 64 percent of the relevant New York market. A87. The gross sales of Honickman were so huge that his organization alone accounted for more volume than the Dr. Pepper/Seven-Up companies for the entire United States. A86. 7-Up is by far the nation's most popular citrus flavored soft drink and outsells the comparable brands of Coca-Cola and Pepsi.

The Petitioners Buy into an Expanded Franchise

Petitioners were individual "mom and pop" companies doing business in New York City and Long Island. The history of their business, more detailed in the averments of the complaint, is both unique and important to an understanding of why this litigation is distinguishable from the "run of the mill" cases cited by the courts below, and which stand for the proposition that mere distributors lack direct injury when a supplier is injured and hence do not enjoy standing to invoke the antitrust laws.

Each petitioner was originally a franchisee and distributor solely of the 7-Up line of soft drinks. Seven-Up Brooklyn Bottling Company ("SB"), a manufacturer and bottler of soft drinks, held the regional franchise for 7-Up under license from the predecessor of defendant Dr. Pepper/Seven-Up Corporation. Subsequently in 1985, however, SB requested that petitioners add to their trucks certain additional national brands. A60-61.

In the Spring of 1985, SB and the petitioners negotiated a contract for the acquisition and subsequent sale of certain additional soft drinks in exchange for which petitioners were guaranteed the exclusive right to carry the new products for so long as they faithfully performed

their contractual undertakings. The national brands were Perrier, Royal Crown Cola or "RC" (to compete with Coca-Cola and Pepsi Cola), Diet Rite, Hawaiian Punch, A&W root beer and cream soda, and Nehi. SB guaranteed that petitioners and their successors would exclusively sell the original and new lines so long as they faithfully performed. Each petitioner owned the exclusive rights for his territory and could sell or transfer the rights to a buyer. These routes are known in the industry as "equity" routes and petitioners are aptly called "equity distributors."

SB further demanded that the cost of acquiring the new line be shared by petitioners since SB could not afford to acquire the new franchises with only its limited resources. Because petitioners would have a continuing vested interest in the new soft drink line and the original Seven-Up line, quite an extraordinary opportunity and unusual deal, they agreed to share the risk and consented to co-finance the franchisor's purchase of the new franchises.

Pursuant to their agreement, petitioners paid SB a franchise fee in the amount of $.95 per case sold for the irrevocable right to distribute both 7-Up products and the additional soft drinks. As further consideration for the deal, plaintiffs agreed to pay more than they had been paying for SB's existing line of 7-Up soft drinks. With this additional income from petitioners, SB could at last compete effectively with Coke and Pepsi. In just two years, by virtue of both their individual sales efforts and cash contributions of the petitioners, SB and petitioners controlled at least 11 percent of the relevant carbonated soft drink market. Petitioners' joint investment was paying large dividends. A60-61.

Honickman Acquisitions

In 1977 respondent Harold Honickman purchased Kirsch Beverage which made and sold No-Cal and Hammer beverages. In 1980 Honickman's corporation formed Canada Dry Bottling Company of New York. The preceding year, Honickman had acquired American Beverage Co. and with it the franchises for Yoo-Hoo, Nedicks, Dr. Brown, Hires and Hoffman carbonated soft drinks. Honickman became the owner of Concord Beverage Company which bottles and sells soft drinks under the Vintage brand name and private labels of chain stores and supermarkets such as A&P and Grand Union.

In 1984 Honickman acquired Pepsi-Cola Bottling Company of New York, Inc. ("Pepsi NY"). A61-62.

SB is Sold

In 1987 the then current owners of SB, the Bengen family, desired to sell the company; SB had a net worth of between ten and fifteen million dollars with sales of approximately $28,000,000. There existed at that time the neighboring regional bottler of 7-Up products namely, New York Seven-Up Bottling Company ("NY 7-Up"), whose management wished to purchase SB in order to merge the two operations into an even more efficient and competitive third tier bottler in order to be able to compete with Honickman's growing empire and Coca-Cola in the New York City market. A62.

In 1987 when SB became available for purchase, it had total assets or annual net sales far in excess of ten million dollars, and as such, SB could not be lawfully

acquired without first complying with the notice and waiting period provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. A62. The purpose of said statute is to permit the FTC and Department of Justice to analyze a proposed merger's impact on competition before the transaction is consummated and thus allow the government to act if the merger's impact is anticompetitive. A63.

SB's owners sold out to a group of companies, each of which was independently buying some of the assets of SB (Real estate, cola franchise, citrus soft drink franchise, etc.). In fact, each was a stalking-horse for Honickman.

According to a complaint in *United States v. Harold Honickman*, (92 Civ. 2436) in United States District Court for the District of Columbia, Harold Honickman, with intent to evade Hart-Scott-Rodino and knowing full well that his acquisition of SB would violate the antitrust laws of both the United States and the State of New York, concocted along with defendant Funston, an elaborate Machiavellian scheme to conceal his actual personal ownership and control of several shell companies formed to acquire SB. The tangled web of limited partnerships and corporations owned by his son, daughter, brother-in-law, and himself together with the elaborate multi-tiered financing of the deal, all being to conceal Honickman's admittedly illegal acquisition, was exposed by the FTC. The details are set out in the complaint para. 22 – 32. A63-69.

Following the exposure of the Honickman conspiracy to evade the antitrust laws, he agreed with the Department of Justice to a consent judgment and payment of a

1.9 million dollars fine. A72. In addition, the FTC and he entered into an agreement prohibiting him from owning additional bottling facilities in the New York area. A71. Honickman had failed in his attempt to make a horizontal acquisition of the SB bottling facility, and with it, the franchises of the 7-Up, and those national brands controlled by petitioners and SB in their area. But he was far from finished.

Honickman Installs a Partner as Buyer

When Honickman was forced to divest, he chose to sell not to the highest bidder, nor to Seven-Up Bottling of New York which desired a merger for economic and marketing efficiency (i.e., to compete with Honickman's soft drink empire) but to his Philadelphia business associate, Lance Funston. A69. Funston, who had little knowledge of the bottling business had gained some degree of notoriety for a leveraged buyout of profitable and venerable New England boat builder O'Day Boat Co. – which shortly thereafter went bankrupt. That is exactly what was to happen to SB and it was no accident. As averred in the complaint, the sale terms were so Draconian and saddled SB with huge debt, that it could not and was intended not to survive. Honickman held notes and was the landlord of SB after the transfer to Funston. A63-74. SB, after the sale of some of its assets, voluntarily went into bankruptcy. The plan had been as simple as it was effective: Strap SB with debt (to Honickman), hold on to the title to the real estate on which SB's plants were located and thus be able to charge higher than market value rents A66. (payable to Honickman) and assume control of the financing of the Funston owned SB operation (with a revocable guarantee by Honickman of a line of credit to SB).

Because no soft drink bottler and distribution operation came close to the Honickman market share in New York City (53-54%), especially since he controlled Pepsi Cola of New York, the only feasible plan to acquire Seven-Up Brooklyn Bottling, which after acquisition would increase Honickman's market share to 64 to 65%, was to turn the previously healthy and expanding SB into a "failing company" thus eligible to be purchased or dissected in spite of anticompetitive consequences. See, *Citizen Pub. Co. v. U.S.*, 394 U.S. 131 (1969).

The Bankruptcy Scenario

When placed into bankruptcy the plan to have Honickman take over the 7-Up and related brands would have to discourage competitive bidding. Failing that, third parties could buy the Chapter 11 company or purchase its assets but in either of these two events, SB and petitioners would be restored to the market place in competition with Honickman. Honickman and the Dr. Pepper/Seven-Up defendants wanted the Seven-Up line on a Pepsi truck. Seven-Up was such a desirable brand in terms of consumer preference that it had given SB the ability to compete with Coke and Pepsi. Retailers would take the full line from petitioners when petitioners marketed their competitive soft drinks.

Why the Petitioners Stood in the Way

Equally important to the plan was to get rid of petitioners. As noted above, SB had entered into a contract with each petitioner that guaranteed that they would offer for sale the full line of products bottled by SB. That

contract followed from petitioners' joint purchase of the additional franchises. Petitioners paid for a vested right to sell the full, expanded line of soft drinks manufactured by SB; and SB owed petitioners the reciprocal obligation to deal with them for so long as those brands were sold. A60-61. Petitioners are thus unlike a typical "distributor" which has claimed antitrust standing and the fact that SB was joined at the hip with petitioners meant that any entity taking over SB was stuck with petitioners for distribution. Parenthetically, this critical fact seems to have been misunderstood or overlooked by both courts below.

Each petitioner had an exclusive territory for which he had paid substantial sums and which territory was recognized by SB as a property right. Hence, each petitioner could sell his route to a successor. Over the years the Seven-Up routes were sold for between one and three hundred thousand dollars each. It is also important to note that petitioners had the right to price their own goods and to make deals with any of their accounts. At the retail level petitioners were a market force to be reckoned with since each could cut prices to increase competition with the two giants – Coke and Honickman's Pepsi. Their presence with the Seven-Up soft drink, the leading citrus brand, together with a balanced line of root beer, cola etc. increased competition, lowered prices and resulted in a strong viable business for 89 independent businessmen.

At this point, SB was in a Chapter 11 proceeding and remained in possession of the estate (all property of SB). SB proposed to sell off its assets namely the Seven-Up franchise (Honickman still owned the land and buildings on which SB stood unlike the pre-Funston company

which owned all the realty and had no landlord to pay). Dr. Pepper/Seven-Up companies' representatives stated unambiguously to the Bankruptcy Court that they would not consent to any bidder for those rights other than a Honickman owned entity. A76. SB went through the motions of entertaining other bids but Funston ignored them and advised interested parties that acquisition was futile and provided no data on SB to aid an intelligent inquiry. A75-77. There was no bankruptcy trustee appointed by the court (contrary to the belief of the Court of Appeals below) since the sale proceeding was expedited by Funston, Honickman and Dr. Pepper/Seven-Up conveniently making it extremely difficult for any bidder to get data to make an informed decision as to the worth of the franchises.

If Honickman was to acquire Seven-Up rights to increase his market share and maintain control of the market, he would have to do so in a way that put petitioners out of the picture. To accomplish that, he and the Dr. Pepper/Seven-Up companies (the national franchisor) agreed that no bidder would be deemed acceptable to the franchisor. In furtherance of that agreement, Dr. Pepper/Seven-Up announced that anyone (except Honickman) purchasing the stock of SB in order to get the 7-Up franchise would be sued for one million dollars for having damaged the brand in the New York market. A76.

In sum, unless a bidder *separated* the franchise from SB/petitioners, they would be sued by one or both of the Dr. Pepper/Seven-Up companies for "damaging the goodwill" of the brand. A76. SB and petitioner were intertwined with all the brands since a valid contract existed between the two, which locked in the distributors

as a reward for having jointly purchased the expanded brands manufactured by SB and exclusively retailed by the petitioners. Meanwhile, as averred in the complaint, and noted by Judge Revercomb, any bids for SB were referred to Funston who advised the bidder that there was already a better deal in the offing from Honickman. A74-75. Only a single bidder emerged in the bankruptcy proceeding and he was driven away by the aforementioned threat of suit. A75.

The FTC Proceedings

Having been approved by the Bankruptcy Court, as the only bidder, and because Judge Goetz opined that SB was a failing company, the road was now clear for Honickman to petition the FTC to allow him not only to take over Seven-Up, but put the product on Pepsi trucks. A76. When the FTC maintained its stance, an administrative appeal was taken to the District Court for the District of Columbia. It is important to note that the D.C. District Court in July, 1992 had found ample proof in the record that Honickman had chilled the bidding for SB and may have been *in pari delicto* with respect to the very failure of SB in the first place. Pages 38 – 40 of July 20, 1992 Memorandum and Opinion, Civ. 91-2712, U.S. District Court, District of Columbia.

When Judge Revercomb died pending an appeal, the case was assumed by Judge Green on remand who thought that SB was a failing company and at that point the FTC and Honickman entered into a stipulation which allowed Honickman *interim* approval to acquire the Seven-Up line since the product was and had been off the

shelves in the New York market for some time. A9. The plan prepared and executed in combination with Funston, the Dr. Pepper/Seven-Up companies had achieved its goal and the targets, petitioners herein, were finished.

REASONS FOR GRANTING THE PETITION

I.

This Court, with one exception, has not dealt with antitrust injury and standing issues since 1986 – *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, a 1977 case, *Blue Shield of Va. v. McCready*, 457 U.S. 465, a 1982 case, *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, a 1983 case and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 decided in 1986. *Cargill* postulated that a party may have suffered antitrust injury but may not be a proper plaintiff under 15 U.S.C. 15 for "other reasons." 479 U.S. 104, 110 n.5 (1986). In 1990 this Court in *Atlantic Richfield Company v. USA Petroleum Company*, 495 U.S. 328 held that a competitor of persons on whom maximum price fixing was imposed does not incur an "injury" since such a person actually benefited from pro-competitive effects of that activity. The *Brunswick, Cargill,* and *Atlantic Richfield* plaintiffs were also denied standing because their claimed injury resulted from increased rather than lessened competition.

In *Associated General,* the plaintiffs alleged that the defendants intended to harm them but were denied standing. 459 U.S. 519 at 545-46. Plaintiff union alleged

defendants coerced builders into refusing to deal with union workers. A union's injury was found to be "only an indirect result" of the restraint of trade. Id. at 541. Direct victims of the coercion, the Court said, could always sue, thus denying the union a remedy "is not likely to leave a significant antitrust violation undetected or unremedied." In that same case, this Court noted the different standing tests followed by various courts of appeal yet declined to adopt any of them since "these labels may lead to contradictory results" noting instead certain factors to be reviewed. Id. at 536 n.33.

Thus, in 18 years, only a single plaintiff, a non-commercial consumer in *McCready*, has survived the standing requirements in cases before this Court. McCready prevailed because her injury (non-reimbursed medical expenses) was "inextricably intertwined" with the antitrust injury of the intended victims (psychologists).

The circuits are split over whether a plaintiff must be a consumer or competitor in the market harmed by the anticompetitive activity. Some circuits say there are two classes for standing: (1) consumer or competitor and (2) or one whose injury is "inextricably intertwined" with the injury to competition. *Province v. Cleveland Press Co.*, 787 F.2d 1047, 1052 (6th Cir. 1986); *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 745-46 (9 Cir. 1984); *Reazin v. Blue Cross and Blue Shield of Kansas*, 899 F.2d 951, 963 (10 Cir. 1990); *In re Lower Lake Erie Iron Ore Antitrust Lit.*, 998 F.2d 1144, 1168-71 (3rd Cir. 1993). Other courts, most notably the Seventh and Eighth Circuits restrict standing to customers or competitors. *Bichan v. Chemetron Corp.*, 681 F.2d 514, 519 (7th Cir. 1982); *S.D. Collectibles, Inc. v. Plough,*

Inc., 952 F.2d 211 (8th Cir. 1991); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 809 (8th Cir. 1987). Based on the case sub judice, the Second Circuit now seems to fall into the latter, narrow standing school.

Compounding the problem is what the Seventh Circuit described as a "great deal of confusion" between doctrines of "antitrust injury" and "antitrust standing." *Greater Rockford Energy and Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 394-95 and referencing Areeda and Hovencamp, *Antitrust Law* p. 334.3 (Supp. 1991). Is "antitrust injury" subsumed by the "antitrust standing" elements or are they two separate concepts? The Court below treated "antitrust injury" as a threshold matter as it did in *Balaklaw v. Lovell*, 14 F.3d 793-98 (2d Cir. 1994) and as did the Eleventh Circuit in *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1449 (11th Cir. 1991). The Fifth Circuit says it is not. *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988).

This case presents a factually clear model. The Honickman companies were horizontal competitors with SB and sought to acquire that franchise. The petitioners competed with the Honickman-owned trucks and with the Honickman companies' "equity" distributors. The averments of the complaint are taken as true so that the conduct generally described above, and particularized in the complaint at issue may be assumed for purposes of analysis. *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961). Thus, the Court can speak to the issue of standing in a non-price fixing context, in a commercial context, where the victims were targeted by the violator for reasons having nothing to do with efficiency, but with an intention to drive them from the market to acquire the assets

of a horizontal competitor. Unlike the prior commercial cases before this Court noted above, these petitioners did not profit from increased competition, they were targeted then destroyed completely by predatory conduct related to respondents' attempt to monopolize and which was intertwined with their conspiracy to monopolize. The Court can state whether such persons do or do not suffer "an antitrust injury."

This case presents an important question of antitrust law relating to the application of the standing doctrine. The two courts below concluded that the described injuries were derivative and that the real party injured was SB which is "the proper party to bring the antitrust action" or "after its bankruptcy, the estate's trustee." A12. There are two problems with this approach. First, it ignores all of the other required factors set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45 (1983) and indeed, the opinion never even mentions *Associated General*. Second, by ignoring the other factors, the courts never addressed the critical fact that "the proper party" was controlled solely by Funston who was part of the conspiracy. Was SB going to sue Funston and Honickman for their own wrongdoing? Moreover, there never was a trustee appointed so that person could not have sued.

Associated General outlined a series of factors to be evaluated on a case-to-case basis namely: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of the type that Congress sought to redress (antitrust injury?); (4) the directness with which the

alleged market restraint caused the claimed injury; (5) the speculative nature of the damages; (6) the risk of duplicative recovery or complex apportionment. 459 U.S. at 537-45. The First and Ninth Circuits have concluded that this is a balancing test where most often some factors weigh in favor of standing and others against. *Sullivan v. Tagliabue*, 25 F.3d 43, 46 (1st Cir. 1994); *Los Angeles Memorial Coliseum v. NFL*, 791 F.2d 1356, 1363. These are discussed briefly below.

Causal Connection. The harm to the petitioners arose from the transfer to Honickman of the SB franchises which never would have happened if SB had been purchased by anyone other than one of the two market dominant companies. Any other bona fide competitor would have kept the franchise and thereafter competed with Coke and Pepsi with a healthy and expanding company. When Honickman was forced out by the FTC, the last thing he wanted was to leave behind a strong growing competitor.

Improper Motive. The motive of all respondents was clear and the strongest of the standing factors – expand the Honickman market share, not by honest competition, but by ruining SB in such a way that petitioners were no longer intertwined with the franchise. The plan had to separate SB from the franchises vested with petitioners, otherwise the petitioners would still be competing with Coke and Pepsi at both the manufacturing and distribution levels. The failing company scenario was planned and executed to perfection.

Nature of Injury and Type Congress Concerned With. For some inexplicable reason the courts below did not

comprehend that when petitioners purchased soft drinks each day and went to retailers and negotiated with them over the best price for their cola, their citrus soft drink, their root beer etc. that petitioners were active participants in the economic interplay of the relevant market. Petitioners kept Coke and Honickman's Pepsi from overcharging or even undercharging since the customer base demanded Seven-Up, whether rationally or not; this was overwhelmingly the preferred soft drink of its kind, which explains why respondents desperately wanted it on the Pepsi trucks. In the economic sense, petitioners were "consumers", purchasers who resold in the relevant market. See, Anderson, *The False Duality of Efficiency and Predation in the Analysis of Monopolizing Conduct*, 33 Santa Clara L.R. 1, 2-3 (1993). The fact that petitioners had shared financing of the SB line and could not be separated from SB's franchises means that they were, at the very least, "inextricably intertwined with the injury the conspirators sought to inflict" on the horizontal competitor which was SB itself. *McCready*, 457 U.S. at 484. Moreover, breaking the umbilical cord between SB and petitioners was a "necessary step in effecting the ends of the alleged illegal conspiracy." Id. at 479.

Directness With Which Restrain Caused the Injury. The petitioners were a target of the plan. As noted above, merely getting permission to purchase SB would not do because of petitioners' vested interest in the franchises. Note, the complaint recited a preliminary injunction issued by the Appellate Division of the New York Supreme Court at petitioners' request stopping SB from selling one of those franchises in which they had an

interest (A&W Root Beer). A73, Para. 51. The direct, foreseeable and intended results of the violation was elimination of petitioners from the marketplace. The party supposedly most directly harmed, SB, has never pursued and will never pursue its own antitrust action. Moreover, since 1990 no plaintiff has emerged other than petitioners. Coca-Cola never sued, which is strong evidence that the effect of the acquisition is not pro-competitive or that principal competitor would certainly protest. See, Cohen and Alore, *Determining the Efficiency of Horizontal Mergers: An Examination of the Abandoned Coca-Cola/Dr. Pepper and Pepsi/7-Up Mergers*, 38 DePaul L.R. 411, 436-37 (1989). This may be because of what the D.C. District Court called the "enduring duopoly" in Honickman's relevant market. A87, Para. 111.

Speculative Nature of the Injuries. The damages suffered are not speculative or difficult to compute. Historically the routes had a value as shown by what was paid for them which, in turn, was computed by volume of sales. The earnings records of each route is also known and lost profits are ascertainable.

Risk of Duplicative Recovery and Complex Apportionment. No one else has sued or ever will. There are no pass-on charges or multiple layers of distribution. Only petitioners were direct purchasers from SB.

The *Associated General* factors, without engrafting artificial limitations taken in their totality and, employing a "balancing test" should result in standing. These petitioners were denied even the opportunity to prove their case through discovery. Most of the cases coming to this Court are reviewed after a full trial or at least from

summary judgment. This case should clarify the antitrust injury and standing issues and give obviously needed guidance in this area of the law.

II.

The Court of Appeals gratuitously added a second ground for denying standing. It held as a matter of law, with no record to support it, that because Honickman was a manufacturing monopolist, his companies had no incentive and could not take another profit as distributor – "a vertically structured monopoly can take only one monopoly profit." It cited *Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 318 (D.C. Cir. 1983), as well as the Chicago School proponents: Bork, *The Antitrust Paradox*, 229 (2d Ed. 1993) and 3 Areeda & Turner, *Antitrust Law*, Sec. 725b (1978) for this remarkable justification of respondents' conduct. Ergo, opined the Court, "the distributors are thus free to offer their services to appellees, who have no incentive to reject the offer if it is more economical than use of their employees, and consumers will benefit from this competition." A13.

Lamoille has absolutely no relevance to the soft drink market in New York and indeed that court was unable even to distinguish between vertical and horizontal mergers. *Lamoille*, 711 F.2d at 318 (describing joining rail service in Maine and outside Maine as a vertical merger).

Whether one agrees with the Chicago School economic theory as it applies to vertical integration referenced in the Appeals Court opinion below, this is not a vertical integration case. This is a horizontal acquisition by one bottler of another bottler's assets which was

accomplished by the respondents' joint predatory conduct, all of which is attacked under federal law as (1) an attempt to monopolize, A86, and (2) a conspiracy to monopolize, A83, and under the state statute, N.Y. Gen. Bus. Law 340, which is the functional equivalent of Sections 1 and 2 of the Sherman Act, A84. Petitioners pointed out that they are also competitors with Honickman's company owned routes where Honickman employees distribute in competition with them. Petitioners' impact on the market, however, reposed in their ability to affect price and service competition with Coke and Pepsi regardless of whether the competition was from a Pepsi Cola Bottling Company owned truck or a Pepsi/Coke equity distributor.

It is especially troublesome for the Appeals Court to suggest that petitioners were now free to elect to go to Honickman to distribute as if nothing happened following which, Honickman would elect the "more economical" distribution system (A13) when the whole point of the scheme was to separate the franchises from SB/petitioners and to put the product on the more numerous Pepsi trucks (not Seven-Up trucks). This is like saying that a person who walks the plank elects to take a swim. Had petitioners even been given an opportunity to show a trial court the real marketplace, the court would have known that all territories in the relevant market are already allocated to the existing Honickman distributors, i.e., in the real world, the New York School of Hard Knocks prevails over the Chicago School of economic theory.

As to the supposed economic justification, it is well to heed the warning of using economic theory as a

substitute for an examination of the marketplace. Spivak, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, printed in *Antitrust Policy in Transition*, 102 (Fox & Halverson Editors, 1984):

> "The principal problem with the Chicago School's approach to economics is that it is based on assumptions that are frequently contrary to real world facts. For example, Chicago School advocates assume that firms are always profit maximizing, that all firms will have free and instantaneous access to all necessary information, that firms will be able to discern which courses of action will be profit maximizing, that sufficient capital will always be available for any new entrant into a market where supra-normal profits are being made . . . and that new entry into a market will not be appreciably more difficult by time factors." Spivak, supra at 102.

The opinion below, A13, shows the folly of these assumptions in the real world. The simplistic approach suggested by the Chicago School and the Appeals Court below, calls to mind the warning " 'sound antitrust policy cannot be founded on the fiction that the world is simple.' The complexities of the real world make it inappropriate to base legal rights and duties that can have economic consequences in the billions of dollars on the predictions of a model that is efficacious because of its lack of realism." Harris & Jorde, *Market Definition in the Antitrust Guidelines: Implications for Antitrust Enforcement*, 71 Calif. L.R. 464, 468 (1983) quoting in part, Schmalensee, *Another Look at Market Power*, 95 Harv. L. Rev. 1789 (1982). This is especially true in a case such as this where there is admittedly high concentration in two groups

(Coke and Pepsi), weak competition from all others, and when the combination accused of wrongdoing seeks to escape an inquiry into the market, their power in it, and the dangerous probability of their success in monopolizing that market by making a premature motion to dismiss.

The points and authorities set forth in Part I and II are intended to address the first three "questions presented." Since the question of standing as well as application of the New York statute are largely the same as the federal law on the subject, and since Gen. Bus. Law 340 is interpreted in light of federal case law as the "Little Sherman Act", Givens, Practice Commentaries, 19 McKinney's Consol. Laws of N.Y. 510, 512 and the cases collected there, petitioners also adopt the foregoing with respect to their claims under GBL 340 and do not waive the New York statute.

III.

In light of the inherent difficulties in any antitrust action where proofs of relevant market, market power, intent, and economic justification, it is important that petitioners' alternative tort theory be considered as well. Essentially, both courts found that there could be no inducement of breach of contract since the "allegations fail to show that appellees had the requisite intent with regard to procuring the breach of [SB's] contracts with appellants. Nothing . . . suggest(s) that the target of appellee's conduct was [SB's] contractual arrangements with appellants' any more than the targets were [SB's] contracts with phone or electric companies." A14.

Contrary to the short shrift the appeals court gave to this theory, the complaint avers with exceptional detail that the object of the respondents' conduct was to cause a breach of the contract between SB and petitioners. The breach occurred when Funston, controlling SB for the benefit of the other respondents, caused SB to reject the petitioners' contracts in the course of the bankruptcy proceedings. 11 U.S.C. 365 (g), provides that "rejection of an executory contract . . . of the debtor constitutes a breach of contract. . . . "

The elements for the tort are correctly set forth below. They are (1) existence of a valid contract [this is conceded by all parties]; (2) defendants' knowledge of the contract [this was never disputed by any party]; (3) intentional procurement of breach; and (4) consequential damages. *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 931, 612 N.E.2d 289, 292 (1993). The third element is in dispute. It should not be. The breach was intentionally procured antecedent to the 11 U.S.C. 365 (g) breach. The "procurement" of the breach was an essential step in the overall plan to make the horizontal acquisition without the contractual link to petitioners and consisted of at least:

(a) Saddling SB with irrationally high debt through loans and Honickman's role as landlord, with the complicity of Funston, to drive SB into bankruptcy court;

(b) Funston's fending off of inquiries from potential bidders seeking acquisition of SB, in spite of his duty to the creditors of SB and his company's contractual obligations to plaintiffs;

(c) The sham search for alternative companies who could bottle and distribute Seven-Up brands in New York in order to dupe the FTC into lifting the prohibition against Honickman owned companies carrying Seven-Up as detailed by Judge Revercomb in the U.S. District Court of the District of Columbia;

(d) Dr. Pepper/Seven-Up falsely telling the bankruptcy court and later the FTC, in the second phase, that there were no other bidders when there were many qualified companies which had contacted Dr. Pepper/ Seven-Up to assume distribution in New York City. [In fact, the federal district court in the District of Columbia found that Honickman had chilled the bidding and was "in pari delicto" in causing the failure of SB. Pages 38-40 of July 20, 1992 memo and order, Civ. 91 - 2712];

(e) Dr. Pepper/Seven-Up announcing that anyone other than Honickman would be sued if they assumed control of SB supposedly for "damage to Seven-Up's goodwill" thereby intimidating bidding from others and cancelling the one thus making it impossible for petitioners to maintain their contract with a successor to SB.

In sum, the fourth question presented, because it is so closely related to the antitrust issues, should be considered as well, otherwise a reversal by this court would leave these related common law claims extinguished.

CONCLUSION

The Court should allow petitioners' writ. There are important questions of antitrust standing and "antitrust injury" which need clarification and which have split the circuits. Since standing is such a fundamental issue to private antitrust enforcement, this case would provide guidance to the lower courts and their litigants. Finally, no rule of law should leave an antitrust victim targeted by the wrongdoers without a remedy. Certainly these petitioners have been injured in an extraordinary but effective manner. "The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. ___, 113 S. Ct. 884, 892, 122 L. Ed. 2d 247 (1993). Respondents have unfairly destroyed competition as well as 89 small local businesses which were dependent on competition in the relevant market for survival. They deserve their day in court.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the second day of June, one thousand nine hundred ninety-five.

Present: The Hon. AMALYA L. KEARSE, C.J.
The Hon. RALPH K. WINTER, C.J.
The Hon. WILLIAM C. CONNER, D.J.*

Docket No. 94-7200

G.K.A. BEVERAGE CORP.; STATEN ISLAND BEVERAGE CORP.; CLOVER BEVERAGE DIST. CORP.; PRINCE BEVERAGE DIST. CORPORATION; GICCI BEVERAGE CORPORATION; V. IOCOLANO DISTRIBUTION CORPORATION; R-KET CORPORATION; P. LAUTAO CORPORATION; VIN-MARE DISTRIBUTION CORPORATION; MANUEL NIEVES LIMITED; VINCENT LAUTATO CORPORATION; ROCKVILLE DISTRIBUTION CORPORATION; LYNVEY BEVERAGE CORPORATION; PA DISTRIBUTION CORPORATION; STARLITE BEVERAGE CORPORATION; 396 6TH AVENUE SYSTEMS CORP.; RAPITZ BEVERAGE CORPORATION; RINDA BEVERAGE CORPORATION; R&E WOLDERICH CORPORATION; WINDY HILLS CORP.; VICTORIA HEIGHTS CORPORATION; DOMINO BEVERAGE CORPORATION; WESTERLEIGH BEVERAGE CORPORATION; QUINCO BEVERAGE CORPORATION; RODAN BEVERAGE CORPORATION; KARE-FRE BEVERAGE CORPORATION; BY SUM BEVERAGE CORPORATION (SIC); BREIT DISTRIBUTION CORPORATION; TITAN BEVERAGE CORPORATION; LUNDON BEVERAGE

DISTRIBUTION CORPORATION; ELLEN BEVERAGE CORPORATION; SCOGNAMIGLIO BEVERAGE CORPORATION; JOSEPH CAUCIELLA, INC.; BREITINGER DISTRIBUTION CORPORATION; FILMAR DISTRIBUTION LIMITED; J. MULVEY DISTRIBUTION CORPORATION; R.A.E. BEVERAGE CORPORATION; THREE GUYS DISTRIBUTION CORPORATION; KENNETH STEFFENS CORPORATION; JOHN BOEHLER CORPORATION; ROE BEVERAGE CORPORATION; DELTA SIGMA CORPORATION; MOE'S BEVERAGE CORPORATION; BARBARO 7UP DISTRIBUTION CORPORATION; GUMBY BEVERAGE CORPORATION; BIG DAN'S BEVERAGE CORPORATION; BALLATO BEVERAGE CORPORATION; JPM BEVERAGE CORPORATION; MILLER BEVERAGE CORPORATION; MATTY CASAMASSINA CORPORATION; DEL BEVERAGE CORPORATION; JERIJO CORPORATION; K&M BEVERAGE DISTRIBUTION CORPORATION; ACE METRO BEVERAGE CORPORATION; DAY LAYT DISTRIBUTION CORPORATION; FRANK MACCORONE CORPORATION; JENTINE BEVERAGE CORPORATION; F.C.L. BEVERAGE CORPORATION; TWIN EAST BEVERAGE CORPORATION; EUGENE & MICHAEL PARINE CORPORATION; ORLINO BEVERAGE CORPORATION; LAR-TIS LTD. CORP.; JAMES QUARTARARO CORPORATION; QUALITY BEVERAGE CORPORATION; M&A TISBO LIMITED; G&C FAVA CORPORATION; P.A.L. BEVERAGE CORPORATION; ALBANESE BEVERAGE CORPORATION; ROSARIO BILOTTI; ROBERT RICH; RAYMOND LEVASSEUR; MIKE CHRISTINA; LINDA VITIELLO; LILLIAN BAGIELTO; ANTOINETTE M. GAMBINO; WILLIAM ROTTKAMP; RICHARD E. MISKOVSKY; NORMAN WALMSLEY; CONRAD PANZA; NICHOLAS J. FORTUNA; FREDERICK J. LUDWIG; MICHAEL HUBBARD; JACK

QUARTARARO; MARY ELLEN TAFFO; and BART SIMONE,

Plaintiffs-Appellants,

v.

HAROLD HONICKMAN; DR. PEPPER/SEVEN-UP COMPANIES, INC.; DR. PEPPER/SEVEN-UP CORPORATION; and LANCE T. FUNSTON,

Defendants-Appellees.

Before: KEARSE and WINTER, *Circuit Judges*, and CONNER,* *District Judge*.

Appeal from dismissal of a complaint by the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*) that alleged claims for violation of the antitrust laws and interference with contractual relations. We affirm the dismissal on the grounds that appellants lack antitrust standing and do not state a claim for interference with contractual relations.

THOMAS A. HOLMAN, New York, New York (Louis Wollin, Lefrak & Holman, New York, New York, Kenneth F. McCallion, Barbara J. Hart, Goodkind Labaton Rudoff & Sucharow, New York, New York, Peter McCallion, Garrison, New York, of counsel), *for Plaintiffs-Appellants G.K.A. Beverage Corp., et al.*

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* The Honorable William C. Conner, Judge, United States District Court for the Southern District of New York, sitting by designation.

RICHARD E. BENNETT, New York, New York, *for Plaintiffs-Appellants Lundon Beverage Distribution Corporation. J. Mulvey Distribution Corporation, Moe's Beverage Corporation, and Day Layt Distribution Corporation.*

PETER E. GREENE, New York, New York (Peter S. Julian, Skadden, Arps, Slate, Meagher & Flom, New York, New York, of counsel), *for Defendant-Appellee Harold Honickman.*

PHILIP D. BARTZ, Washington, D.C. (Leslie J. Cloutier, Morrison & Foerster, Washington, D.C., Mark P. Ladner, Morrison & Foerster, New York, New York, of counsel), *for Defendants-Appellees Dr. Pepper/Seven-Up Companies, Inc. and Dr. Pepper/Seven-Up Corporation.*

DAVID A. ROBINSON, New York, New York, *for Defendant-Appellee Lance T. Funston.*

WINTER, *Circuit Judge*:

Eighty-nine former distributors of Seven-Up soft drinks and other beverages (the "distributors") appeal from Judge Glasser's dismissal of their complaint alleging claims for violation of state and federal antitrust laws and interference with contractual relations. The distributors contend that the appellees, Dr. Pepper/Seven-Up Companies, Inc. and Dr. Pepper/Seven-Up Corporation

(collectively "Dr. Pepper/Seven-Up"), Harold Honickman ("Honickman") and Lance T. Funston ("Funston") intentionally forced Seven-Up Brooklyn Bottling Company, Inc. ("Seven-Up Brooklyn") out of business in order to drive the distributors out of business and permit defendant Honickman to reacquire Seven-Up Brooklyn's assets free and clear of distribution agreements with the plaintiffs. This conduct, they argue, entitles them to relief under the antitrust laws. We affirm the district court's dismissal of the antitrust claims on the ground that the distributors lack antitrust standing. We also affirm the district court's dismissal on the merits of the state law claims for interference with contractual relations.

BACKGROUND

Because this appeal is from a Fed. R. Civ. P. 12(b) (6) dismissal for failure to state a claim upon which relief can be granted, we assume the allegations of the amended complaint to be true.

We begin with a brief description of the complaint's allegations concerning the structure of the soft drink industry and the role of the parties in that structure. Parent concentrate companies such as Dr. Pepper/Seven-Up sell syrup or concentrate to bottling companies, such as Seven-Up Brooklyn. The bottling companies obtain licenses to use that syrup or concentrate in bottling and distributing soft drinks in specified geographical areas. In the early 1990s, there were three bottlers in the New York City area: (i) the Coca-Cola Bottling Company of New York, which distributed Coca-Cola brands; (ii) Honickman, who sold the products of PepsiCo., Inc., and other

brands such as Canada Dry; and (iii) Seven-Up Brooklyn and Seven-Up Bottling Company of New York. Seven-Up Brooklyn had contracts with independent truck drivers – the plaintiff distributors – who paid Seven-Up Brooklyn for exclusive territorial rights to distribute its soft drinks to retail establishments.

Honickman entered the soft drink industry in 1977 and over time acquired numerous bottling companies. Without including the Seven-Up brands, which are the subject of this litigation, Honickman is alleged to control the sale to retailers of over half of the carbonated soft drinks in New York City. When the Seven-Up brands are included, Honickman is alleged to control 64 percent of that market. The combined market share of Honickman's companies and the one other large competitor in the bottling of carbonated soft drinks, Coca-Cola Bottling Company of New York, is alleged to constitute 95 percent of the carbonated soft drink market in New York City. Honickman does not presently use independent drivers to distribute its products but rather employs drivers directly.

We turn now to the events that gave rise to this litigation. In July 1987, Long Island Acquisition Company ("LIA"), a partnership in which Honickman and members of his family held a 52 percent share and Funston a 48 percent share, acquired all of Seven-Up Brooklyn's non-cola soft drink franchise rights, vehicles, vending machines, and related equipment. The complaint alleges that this transaction was facilitated by either a cash contribution or a loan guarantee from Canada Dry Bottling of New York, a Honickman-owned company. Seven-Up Brooklyn's plant in Melville, New York was acquired by

Melville Business Partners L.P., a partnership of which the general and managing partner was Honickman and the six limited partners were his two children and four employees of Honickman-owned companies. Berriman Cozine Corporation, owned by Honickman's brother-in-law, purchased Seven-Up Brooklyn's facility in Brooklyn. According to the complaint, these acquisitions were financed largely by credit guarantees made by Honickman and Honickman-owned companies. Following the consummation of these transactions, LIA leased the Melville and Brooklyn facilities from their new owners.

Honickman's control of Seven-Up Brooklyn caused the Federal Trade Commission ("FTC") to investigate the anticompetitive effects of the acquisition. In late 1988, to avoid a legal dispute with the FTC, Honickman and his family sold their interest in LIA, which held the operating assets of Seven-Up Brooklyn, to Funston. However, the complaint alleges that Honickman remained secretly in control of Seven-Up Brooklyn and that the assets were transferred in such a way that Honickman could later reclaim them.

In November 1989, the FTC issued an administrative complaint challenging Honickman's acquisition of Seven-Up Brooklyn. Honickman subsequently entered into an agreement with the FTC providing that, for a period of ten years, Honickman would not acquire, directly or indirectly, any interest in any carbonated soft drink bottling operation in the New York metropolitan area without the prior approval of the FTC. Nevertheless, according to the complaint, Honickman and Funston secretly intended to cause Seven-Up Brooklyn to fail so that Honickman could reacquire it and counter any antitrust charges with the

failing company defense. That defense permits an otherwise unlawful acquisition where the acquiree will go out of business if the acquisition is forbidden. See H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950); *see also International Shoe v. FTC*, 280 U.S. 291, 302-03 (1930); 4 Phillip Areeda & Donald F. Turner, Antitrust Law, §§ 924-931 (1978).

In October 1990, Seven-Up Brooklyn did in fact fail, filing a petition for Chapter 11 bankruptcy reorganization after a bank cancelled a line of credit. Thereafter, Seven-Up Brooklyn filed an application in the bankruptcy court for an order setting a hearing date to consider the sale of the company's assets. The application included a draft agreement pursuant to which Honickman would purchase Seven-Up Brooklyn's existing inventory, and a division of Dr. Pepper/Seven-Up would purchase Seven-Up Brooklyn's remaining franchise assets, which it in turn would sell to Honickman. At the bankruptcy court hearing, there were two bidders for the company's assets: Kenneth Kraus and the combination of Dr. Pepper/Seven-Up and Honickman.

The distributors favored the Kraus offer, which contemplated the continued operation of Seven-Up Brooklyn as a separate entity. At the hearing, the distributors alleged that Honickman, Funston, and Dr. Pepper/Seven-Up had conspired to rig the bidding in order to obtain market power in the carbonated soft drink market and had conducted a sham investigation to show falsely the lack of other qualified buyers. The bankruptcy court rejected both proposals and terminated Seven-Up Brooklyn's authority to use cash collateral. At a later hearing, according to the complaint, Dr. Pepper/Seven-

Up represented to the bankruptcy court that Seven-Up Brooklyn was liable to it for more than a million dollars, and that any successor to Seven-Up Brooklyn would immediately be sued for this amount. According to the complaint, this discouraged the only other bidder from pursuing the acquisition of Seven-Up Brooklyn and allowed Honickman ultimately to make a successful bid. The bankruptcy court's order approving the acquisition of the assets of Seven-Up Brooklyn by Honickman was not appealed.

The FTC initially denied approval of the sale to Honickman on the ground that it failed to satisfy the failing company defense. Later, the FTC relented, permitting Honickman to acquire licenses from Dr. Pepper/Seven-Up and to distribute the soft drink brands formerly bottled by Seven-Up Brooklyn.

The distributors' complaint alleged that Honickman's efforts to acquire Seven-Up Brooklyn's non-cola bottling assets constituted monopolization of the carbonated soft drink market in New York City and intentional interference with present and prospective contractual relations.

The district court held that the claims were barred by the doctrine of res judicata, because the distributors' claims were "based essentially on the same factual issues that they raised before the bankruptcy court," but simply alleged new legal theories. As alternative grounds for the dismissal of the complaint, the district court held that: (i) the distributors failed to allege the type of antitrust injury necessary to confer standing to maintain a suit under the antitrust laws; (ii) the distributors' claim for tortious interference with present contractual relations failed

because the distributors did not allege that Honickman's conduct proximately caused Seven-Up Brooklyn to breach its contract with the distributors; and (iii) the distributors' claim for tortious interference with prospective contractual relations failed because the distributors had not alleged that Honickman had taken any action with respect to the third parties with whom the distributors claimed to have had prospective relationships.

This appeal followed.

DISCUSSION

The distributors' complaint alleged three distinct claims for violation of state and federal antitrust laws: (i) that appellees conspired to eliminate both the distributors and Seven-Up Brooklyn as competitors, in order to monopolize the carbonated soft drink market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; (ii) that appellees conspired to restrain trade in order to monopolize the carbonated soft drink market at the bottler and distribution level, in violation of the Donnelly Act, N.Y. Gen. Bus. Law § 340; and (iii) that appellees attempted to monopolize the New York carbonated soft drink market, also in violation of Section 2 of the Sherman Act. We conclude that all three antitrust claims are barred because the distributors lack antitrust standing.

Antitrust injury is necessary, but not sufficient, for antitrust standing. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986). Although antitrust standing analysis often includes additional factors, *id.* at 111 n.6; *see also Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988) (setting forth factors

comprising antitrust standing analysis), the issue of antitrust injury is dispositive in the instant case.

We believe that the distributors do not have standing to bring an antitrust claim against defendants because the distributors have not alleged an antitrust injury. Their antitrust claims essentially boil down to the contention that Honickman, Funston, and Dr. Pepper/Seven-Up conspired to destroy Seven-Up Brooklyn through predatory practices and, in doing so, eliminated the distributors' contractual rights with Seven-Up Brooklyn to market soft drinks at the retail level. For this elimination of contractual rights to be antitrust injury, it must constitute the kind of injury that the antitrust laws were directed at. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). However, "[m]erely derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing." *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1378. (7th Cir. 1987). It follows naturally that a party in a business relationship with an entity that failed as a result of an antitrust violation has not suffered the antitrust injury necessary for antitrust standing. *See. e.g., Lovett v. General Motors Corp.*, 975 F.2d 518, 521 (8th Cir. 1992) (denying antitrust standing to sole shareholder where only alleged injury stemmed from failure of corporation), *cert. denied*, 114 S. Ct. 1058 (1994); *Sharp v. United Airlines, Inc.*, 967 F.2d 404, 407-08 (10th Cir.) (denying antitrust standing to employees where only alleged injury stemmed from failure of corporation), *cert. denied*, 113 S. Ct. 464 (1992).

If Seven-Up Brooklyn, before its bankruptcy, had cancelled its distribution agreements and hired delivery drivers as employees, the distributors would not have been able to assert an antitrust violation. Lacking such a claim against Seven-Up Brooklyn, the distributors also lack a claim against Honickman, Funston, and Dr. Pepper/Seven-Up, who, having taken over Seven-Up Brooklyn's business, have not hired the plaintiffs as distributors.

Although the distributors undoubtedly suffered injury as a result of the alleged antitrust violation, the injury suffered by the distributors is derivative of the injury suffered by Seven-Up Brooklyn. Thus, accepting the antitrust allegations as true, it was not the distributors that suffered direct antitrust injury, but Seven-Up Brooklyn. Therefore, the proper party to bring the antitrust action on these facts was Seven-Up Brooklyn, or, after its bankruptcy, the estate's trustee.

In *A.G.S. Electronics, Ltd. v. B.S.R. (U.S.A.). Ltd.*, 460 F. Supp. 707 (S.D.N.Y.), *aff'd*, 591 F.2d 1329 (2d Cir. 1978), a manufacturer of record players acquired another manufacturer, thereby allegedly monopolizing the market. The acquiring manufacturer then terminated an exclusive distributorship contract which the acquired manufacturer had with the plaintiff. The court held that the terminated distributor lacked standing to assert an antitrust claim because the injuries "all flow from the termination of its distributorship rather than any anticompetitive effects of the defendants' acquisition of [the second manufacturer]." *Id.* at 710. We believe that the same result is mandated in the instant case.

The distributors attempt to recharacterize their antitrust claims by arguing that they suffered antitrust injury in the elimination of competition in retail distribution between themselves and Honickman. However, the so-called "distribution monopoly" is derived entirely from Honickman's share of the bottling market. Honickman's "distribution monopoly" thus involves only his product. Moreover, a vertically structured monopoly can take only one monopoly profit. *See Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 318 (D.C. Cir. 1983); *see also* Robert H. Bork, *The Antitrust Paradox* 229 (2d ed. 1993); 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* § 725b (1978). If, as alleged, appellees successfully conspired to monopolize soft drink bottling in the New York area, they could reap no additional gain from monopolizing the retail distribution of soft drinks. If a monopolist at the distribution level were to restrict output to maximize profit, the restriction would deprive the monopolist at the bottling level of its maximizing output and price. Once having achieved the alleged bottling monopoly, therefore, appellees' sole incentive is to select the cheapest method of distribution. *See Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir. 1979). The distributors are thus free to offer their services to appellees, who have no incentive to reject the offer if it is more economical than use of their employees, and consumers of soft drinks will benefit from this competition.

The distributors' claim for tortious interference with contractual relations was also properly dismissed by the district court. The distributors allege that appellees intentionally interfered with Seven-Up Brooklyn's performance of the distribution contracts. Under New York law,

there are four elements to the tort of intentional interference with contractual relations: (i) existence of a valid contract; (ii) defendant's knowledge of that contract; (iii) defendant's intentional procurement of the breach of that contract; and (iv) damages caused by the breach. *See Kronos, Inc. v. AVX Corp.*, 612 N.E.2d 289, 292 (N.Y. 1993).

We believe that appellants' allegations fail to show that appellees had the requisite intent with regard to procuring the breach of Seven-Up Brooklyn's contracts with appellants. Nothing in the allegations may reasonably be read to suggest that the target of appellees' conduct was Seven-Up Brooklyn's contractual arrangements with appellants' any more than the target was Seven-Up Brooklyn's contracts with phone or electric companies. As alleged, Honickman's sole interest was to achieve the soft-drink bottling monopoly, and the distribution system utilized by the target of his allegedly predatory behavior was irrelevant to that goal.

The distributors' claim for tortious interference with prospective business relations was also properly dismissed by the district court for failure to state a claim. To prevail on this claim, under New York law, "a plaintiff must demonstrate that the defendant interfered with business relations existing between a plaintiff and a third party, either with the purpose of harming the plaintiff or by means that are dishonest, unfair, or improper." *Volvo N. Am. Corp.*, 857 F.2d at 74. The distributors contend that appellees interfered with their relationships with retailers and other final purchasers of soft drinks. As noted, however, appellees' alleged goal was to obtain a monopoly in bottling, and the distributors' relationship with their retail customers is irrelevant to that goal. The distributors

thus make no allegations that appellees had any contact with the distributors' customers or that appellees tried to convince the customers to make contracts with them rather than the distributors. It is axiomatic that, in order to prevail on this claim, the distributors would have to show that the appellees intentionally caused the retailers not to enter into a contractual relation with them. *See Marilyn Miglin, Inc. v. Gottex Indus.*, 790 F. Supp. 1245, 1254 (S.D.N.Y. 1992); *see also Volvo N. Am. Corp.*, 857 F.2d at 74. The distributors cannot allege such intentional interference, and their claim therefore fails.

CONCLUSION

For the foregoing reasons, we affirm the dismissal of the complaint.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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G.K.A. BEVERAGE CORP., STATEN ISLAND BEVERAGE CORP., et al.,

Plaintiffs,

-against-

HAROLD HONICKMAN, DR PEPPER SEVEN-UP COMPANIES, INC., DR PEPPER/SEVEN-UP CORPORATION, and LANCE T. FUNSTON

Defendants.

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MEMORANDUM AND ORDER

CV-93-2205

GLASSER, United States District Judge:

Defendants Harold Honickman ("Honickman"), Dr Pepper Seven-Up Companies, Inc. and Dr Pepper/Seven-Up Corporation (collectively "DPSU") and Lance T. Funston ("Funston") have made separate motions pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Complaint in its entirety. For the reasons set forth below, defendants, motions are granted and both the federal and state law claims are dismissed.

FACTS

Plaintiffs G.K.A. Beverage Corp., Staten Island Beverage Corp., et al. ("GKA Beverage"), eighty-nine former distributors of the now-defunct Seven-Up Brooklyn Bottling Company, Inc. ("Seven-Up Brooklyn"), commenced

this action by filing a Complaint on May 18, 1993. Plaintiffs' claims arise from the bankruptcy and ultimate closing in February 1991 of Seven-Up Brooklyn. Plaintiffs contend, in essence, that beginning in 1987, when Honickman first purchased an interest in Seven-Up Brooklyn, defendants intentionally forced the company into bankruptcy so that they could drive the plaintiffs out of business, evade the antitrust laws and reacquire Seven-Up Brooklyn's assets free and clear of plaintiffs, distribution agreements. Compl. ¶ 1.

I. Background

The soft drink industry generally functions at two levels: parent companies (*e.g.*, Coke, Pepsi, DPSU), which sell syrup or concentrate for their brands to bottling companies; and bottling companies (*e.g.*, Seven-Up Brooklyn), which obtain licenses to bottle and distribute a product in specific geographic areas. DPSU Mem. at 2-3. Until the early 1990s, there were three bottling "systems" in the New York City area: the Coca-Cola Bottling Company of New York, which distributed Coca-Cola brands; defendant Honickman, who sold the products of PepsiCo, Inc., as well as other parent company brands such as Canada Dry; and Seven-Up Brooklyn and Seven-Up Bottling Co. of New York ("New York Seven-Up"), which sold the non-Coke and non-Pepsi brands. DPSU Mem. at 3-4. These local bottlers entered into contracts with independent truck drivers – "equity distributors" – who paid the bottlers for exclusive territorial marketing rights. The plaintiffs in this case were equity distributors for Seven-Up Brooklyn.

For purposes of this motion to dismiss, the following allegations in the Complaint are taken as true. Honickman first acquired an interest in the New York soft drink industry in 1977, when he purchased Kirsch Beverage. He thereafter acquired outright or acquired interests in Canada Dry Bottling Company of New York ("CDNY"), American Beverage Co., Concord Beverage Company and Pepsi-Cola Bottling Company of New York, Inc. Compl. ¶¶ 16-18. In July 1987, Long Island Acquisition Company ("LIA"), a partnership in which Honickman, together with members of his family, indirectly held a 52% share, acquired all of Seven-Up Brooklyn's non-cola soft drink franchise rights, vehicles, vending machines and related equipment for $8.8 million. Compl. ¶ 22. In addition, Melville Business Partners, a partnership allegedly comprised of Honickman, his two children and four employees of Honickman-owned companies, acquired Seven-Up Brooklyn's plant in Melville, New York for $4 million, Compl. ¶ 22; and Berriman Cozine Corporation, owned by Honickman's brother-in-law, purchased Seven-Up Brooklyn's Brooklyn facility for $5 million. Compl. ¶ 22.

The acquisitions – in particular, those by Melville Business Partners and Berriman Cozine Corporation – were financed largely with credit that had been extended to the acquiring entities based on the creditworthiness of Honickman and Honickman-owned companies. LIA – and indirectly Seven-Up Brooklyn thereafter incurred the obligation to pay an inflated monthly rent for the Melville and Brooklyn facilities. Compl. ¶¶ 23, 25, 46.

On November 18, 1987, Honickman caused Seven-Up Brooklyn to borrow from Continental Bank $4 million

secured by Seven-Up Brooklyn's accounts receivable, "which loan proceeds . . . went to defendant Honickman or one of his controlled entities." Compl. ¶ 28. Honickman also switched most of the bottling operation and Seven-Up Brooklyn's purchasing to CDNY, which was "held out to be a competitor" of Seven-Up Brooklyn; "in this manner, Honickman created a profit center at his CDNY plant while at the same time dealing a fatal blow to New York Seven-Up [a competitor of Honickman unaffiliated with any of the parties in this case] which immediately lost its largest customer." Compl. ¶ 29.

The acquisition of Seven-Up Brooklyn by Honickman-controlled companies caused the Federal Trade Commission (the "FTC") to commence an investigation into the effects of the transaction on competition. Compl. ¶ 31; *see Dr Pepper/Seven-Up Cos., Inc. v. Federal Trade Commission*, 798 F. Supp. 762, 764 (D.D.C. 1992), *rev'd in part and remanded*, 991 F.2d 859 (D.C. Cir. 1993)). In anticipation of a lawsuit by the FTC, Honickman decided to sell the assets of Seven-Up Brooklyn "but in such a way that he could later reclaim [them] in spite of antitrust obstacles, and in spite of the fact that the plaintiff distributors now had valid and enforceable rights. . . . " Compl. ¶ 32. Honickman accordingly sold his interest in LIA to entities owned by defendant Funston, who had been Honickman's partner or joint venturer in other businesses. However, Honickman remained in control of Seven-Up Brooklyn, and the "undisclosed intent" of both Honickman and Funston was to make Seven-Up Brooklyn

fail so that Honickman could reacquire it as a "failing company."[1] Compl. ¶¶ 33-35; 39-42.

> [I]t was the undisclosed intent of Funston and Honickman to rid (or divest for the benefit of Honickman and his companies) [Seven-Up Brooklyn] of the contractual rights and obligations to the plaintiffs who collectively had valuable vested rights, (a) by virtue of distribution contracts previously entered into between [Seven-Up Brooklyn] and each of them and (b) because plaintiffs had actually financed, in large part, the purchase of the additional valuable franchises to A&W Root Beer and Cream soda, RC Cola, Diet Rite, Hawaiian Punch, Nehi and Perrier, all of which were exclusively sub-franchised to them.[2]

Compl. ¶ 49.

Seven-Up Brooklyn sustained losses during 1989, and in September, Funston offered its A&W franchise for sale to Coca-Cola. Compl. ¶ 50. After the sale was consummated for $7.5 million, the proceeds went in substantial

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[1] Plaintiffs claim that notwithstanding Seven-Up Brooklyn's "mounting losses" under Funston, Funston received consulting fees and interest payments totaling $438,288. Compl. ¶ 48.

[2] With respect to the purchase of the additional franchises, plaintiffs allege that in 1985, they negotiated with Seven-Up Brooklyn a contract for the distribution of the above-listed franchises, in exchange for which they "were guaranteed the right to carry the new products for so long as [they] faithfully performed their distributorship undertakings." Compl. ¶ 12.

part to CDNY and other Honickman-owned companies.[3] Compl. ¶ 51.

At some point in 1990, Honickman and Funston had a "falling out," as a result of which Continental Bank cancelled a line of credit it had extended Seven-Up Brooklyn; Seven-Up Brooklyn's checks were dishonored; and in October 1990, Seven-Up Brooklyn filed a Chapter 11 bankruptcy petition in the Eastern District of New York. Compl. ¶¶ 53-54. Because Seven-Up Brooklyn had defaulted on its obligations, DPSU sought to terminate for cause its licenses with Seven-Up Brooklyn. DPSU Mem. at 5. Plaintiffs allege that Funston and Honickman intended to cause the bankruptcy "as the means by which Honickman could do what is forbidden by the antitrust laws and his consent judgment – reacquire the 7-Up franchise and related franchises in order to monopolize the carbonated soft drink business in New York City." Compl. ¶ 55.

On October 18, 1990, Bankruptcy Judge Cecilia Goetz granted Seven-Up Brooklyn's motion for use of cash collateral pending reorganization so that Seven-Up Brooklyn could continue to operate while working out a plan for reorganization. Honickman Mem. at 7; *In the Matter of Seven-Up Brooklyn Bottling Co.*, No. 090-71516 (11) (Bankr. E.D.N.Y.).

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[3] The A&W sale originally was barred by an injunction issued by the New York Appellate Division, Second Department, as the result of a lawsuit commenced by plaintiffs. The suit was withdrawn after the parties reached a settlement calling for increased commissions payments by Seven-Up Brooklyn to the distributors. Compl. ¶ 51.

In the interim, on November 2, 1989, the FTC had issued an administrative complaint challenging Honickman's acquisition of Seven-Up Brooklyn. The complaint alleged that the acquisition violated section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and section 7 of the Clayton Act, 15 U.S.C. § 18, and sought, *inter alia*, divestiture of Honickman's interest in the company. *See Dr Pepper/Seven-Up Cos., Inc.*, 798 F. Supp. at 764. In January 1991, Honickman entered into an "Agreement Containing Consent Order" with the FTC to settle the administrative complaint. Pursuant to the agreement, Honickman agreed that for ten years he would not acquire directly or indirectly any interest in any carbonated soft drink bottling operation in New York without the prior approval of the FTC. *Id.* at 765.

II. The Bankruptcy Court Proceedings

On January 28, 1991, Seven-Up Brooklyn filed an application in the bankruptcy court pursuant to 11 U.S.C. § 363 for an order setting a hearing date for the sale of the company's assets. Judge Goetz conducted two hearings on notice to the creditors (and published in the *New York Times*) in February and March 1991. Only two bidders emerged at the hearings: Honickman/DPSU and Kraus Industries. Honickman proposed that – conditioned upon FTC approval – he would purchase Seven-Up Brooklyn's existing inventory and DPSU would purchase Seven-Up Brooklyn's remaining franchise assets, which it, in turn, would sell to Honickman. Honickman/DPSU did not intend to continue to operate Seven-Up Brooklyn as a distinct entity; however, Honickman pledged to make

sixty distributor jobs available to plaintiffs. (*e.g.* Transcript of Feb. 27, 1991 Bankruptcy Hearing ("2/27/91 Tr.") at 30). The Honickman/DPSU proposal was supported by Seven-Up Brooklyn, the two secured creditors, the unsecured creditors committee, DPSU and most of the other franchisors. (2/27/91 Tr. at 149).

The Kraus proposal contemplated the continued operation of Seven-Up Brooklyn but did not include funds sufficient to satisfy the company's obligations to its junior secured creditor or the franchisors. *Dr Pepper/Seven-Up Companies, Inc.*, 798 F. Supp. at 766. The equity distributors vigorously supported the Kraus proposal.

Plaintiffs allege that as the result of an agreement between Honickman, Funston and DPSU, "the bidding [at the hearings] was rigged and the outcome was a foregone conclusion;" that DPSU withheld from the bankruptcy court pertinent information about potential buyers; that Honickman and DPSU conducted a sham investigation which showed no qualified buyers; that Funston directed Seven-Up Brooklyn employees to tell inquiring parties that rights to the company were not available; that DPSU fabricated a claim of liability against Seven-Up Brooklyn; and that DPSU imposed a "franchise acquisition fee" on any party inquiring into the franchise rights for all territories previously serviced by Seven-Up Brooklyn.[4] Compl. ¶¶ 57-63.

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[4] The District Court for the District of Columbia noted that "DPSU made it clear to the court that it would require any other buyer than Honickman to pay DPSU $1.4 million to cover Seven-Up Brooklyn's debt to DPSU for Seven-Up concentrate and to compensate DPSU for the Seven-Up Brooklyn's failure to

Plaintiffs[5] appeared at the bankruptcy hearings on February 27 and March 5, 1991 and opposed the Honickman/DPSU proposal; they alleged at the hearing – as they have in their Complaint – that Honickman, Funston and DPSU conspired to chill the bidding for Seven-Up Brooklyn. For example, at the February 27 hearing, an attorney for the Distributors Group, James Levy (an officer of Seven-Up Brooklyn) and individual distributors alleged that Honickman had made it impossible for other bona fide purchasers to come to the table and that Funston had "blocked" prospective buyers (2/27/91 Tr. at 121, 130-31). In addition, plaintiffs' counsel, Mr. Bennett, argued that Honickman was attempting "to purchase the company free and clear of any of the debts and free and clear of" FTC impediments and the equity distributors. (2/27/91 Tr. at 132). In reaching her decision, Judge Goetz alluded to the "serious charges" made against Honickman during the proceedings and noted that "there is reason to believe that other people have been discouraged from bidding," (2/27/91 Tr. at 157, 159); she accordingly disapproved of both Honickman's and Kraus's bids and terminated Seven-Up Brooklyn's authority to use the

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promote the brand during the bankruptcy period. . . . It was also apparent to the bankruptcy judge that any other bidder than Honickman would face a potential lawsuit from DPSU." *Dr Pepper/Seven-Up*, 798 F. Supp. at 766.

[5] From the transcripts of the hearings before Judge Goetz on February 27 and March 5, 1991, it is not clear which of the plaintiff-distributors were represented. Richard Bennett, the attorney for the plaintiffs here, appeared at both hearings as the attorney for the Soft Drink Distributors Association.

cash collateral advanced by its secured lenders. (2/27/91 Tr. at 159).

However, at the hearing on March 5, 1991, Judge Goetz reconsidered her decision. Kraus submitted a revised proposal which Seven-Up Brooklyn, the secured and unsecured creditors and some of the franchisors found unacceptable. Judge Goetz also found the offer inadequate and Kraus withdrew it. (Transcript of March 5, 1991 Bankruptcy Hearing ("3/5/91 Tr.") at 47). Honickman resubmitted his proposal and Mr. Bennett, "on behalf of the distributors," again alleged that Honickman had "colluded with his purchasers and colluded with his suppliers." (3/5/91 Tr. at 48). In response, Judge Goetz stated

> There are obviously strong passions here and people's fortunes involved and you have people who you think are representing you more exactly. This is only a Bankruptcy Court and I'm only involved with a small portion of it. *There are other places and other Courts where some of these arguments can be made to be more effect [sic] and with more purpose, and an evidentiary hearing has to be held on it. I can't accept them,* so please try and restrain yourselves.

(3/5/91 Tr. at 48-49) (emphasis added).[6] Notwithstanding her concern with the allegations, with the possibility of

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[6] In response to comments by Mr. Bennett concerning one of his client's loss of livelihood "here today," Judge Goetz remarked that "[the distributor] didn't lose his livelihood here today. His livelihood was lost when this company went into Chapter 11. . . . to the extent that their jobs depend upon the functioning of this company, they lost their jobs." (3/5/91 Tr. at 57-58).

FTC disapproval and with keeping Seven-Up Brooklyn in business, Judge Goetz concluded that the only way the company could stay in the marketplace at all was to accept Honickman's proposal. (3/5/91 Tr. at 64). Judge Goetz expressed the hope that the FTC ultimately would approve Honickman's offer under the failing company doctrine, and commented that Seven-Up Brooklyn was "a failed company if ever I've seen one." (3/5/91 Tr. at 64). On May 2, 1991, Judge Goetz entered an order approving the sale of Seven-Up Brooklyn's non-cola bottling assets to Honickman and DPSU. DPSU Mem. Ex. 3.

III. The FTC Proceedings

After February 12, 1991, Honickman sought the FTC's approval of the proposed acquisition. Honickman and DPSU allegedly enlisted the aid of Senators Arlen Specter and Lloyd Bentsen, as well as Representative Charles Schumer, to pressure the FTC. Compl. ¶¶ 65-68. During the public comment period following publication of Honickman's application, plaintiffs submitted written objections to the proposed acquisition. The FTC denied Honickman's application on October 3, 1991 on the grounds that the application did not show that the proposed acquisition would be procompetitive and that it satisfied the requirements of the failing firm defense. *See Dr Pepper/Seven-Up, Inc.*, 798 F. Supp. at 767. The decision ultimately was reversed in part by the Court of Appeals for the District of Columbia for reconsideration of the proposed acquisition under the failing company defense. *See Dr Pepper/Seven Up Companies, Inc. v. FTC*, 991 F.2d 859 (D.C. Cir. 1993). The FTC's decision is still pending on remand. *See In the Matter of Harold A. Honickman*, FTC

Docket No. 9233. During the pendency of the litigation with the FTC, Honickman has retained the right to sell Seven-Up brands in the Brooklyn territory on an interim basis. DPSU Mem. Ex. 4.

New York Seven-Up, another bottling company alleged to be a competitor of Honickman's, failed in October 1991, and Honickman subsequently filed an application with the FTC to acquire its franchises. Compl. ¶ 69. The FTC's decision with respect to New York Bottling is currently on appeal in the United States District Court for the District of Columbia. DPSU Mem. at 9.

IV. Plaintiffs' Claims

Plaintiffs assert five causes of action against defendants. First, they allege that defendants intentionally interfered with their contractual relations with Seven-Up Brooklyn. Compl. ¶¶ 72-83. Second, they allege that defendants interfered with their prospective contractual relations with retailers in their exclusive marketing territories. Compl. ¶¶ 84-92. Third, plaintiffs claim that defendants violated the Sherman Act by conspiring to monopolize and to eliminate plaintiffs, Seven-Up Brooklyn and New York Bottling as competitors. Compl. ¶¶ 93-95. Fourth, plaintiffs allege that defendants violated section 340 of the N.Y. Gen. Bus. Law – the "Donnelly Act" – by conspiring to maintain and maintaining a monopoly in the conduct of the New York City carbonated soft drink business and by restraining business at the bottler level or at the distribution level, or both. Compl. ¶¶ 96-102. Finally, plaintiffs allege that defendants violated the United States antitrust laws, 15 U.S.C.

§ 2, by attempting to monopolize the carbonated soft drink market in New York City. Compl. ¶¶ 103-12.

Plaintiffs allege that during the course of defendants' efforts to "destroy" and then reacquire Seven-Up Brooklyn, they "have injured plaintiffs in their business or property or both in that their respective businesses have been destroyed and they have lost the profits reasonably anticipated from the normal course of their businesses." Compl. ¶¶ 103-13. Plaintiffs seek treble damages and an order permanently enjoining Honickman and Funston from owning directly or indirectly any company which sells or bottles any Dr Pepper/Seven-Up franchised soft drinks or any of the goods formerly distributed by plaintiffs.

Defendants assert that plaintiffs' claims should be dismissed on the following grounds: (1) the complaint is barred in its entirety by the doctrine of res judicata; (2) plaintiffs lack standing to challenge defendants' conduct under the antitrust laws; (3) defendants' acts are protected under the Noerr-Pennington doctrine; and (4) plaintiffs have failed to state a claim under New York law for tortious interference with present and prospective contractual relations.[7]

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[7] Defendant Funston asserts that the Complaint against him should be dismissed on the additional grounds that it does not allege how he would have benefited from the alleged conspiracy among the defendants; and it "does not allege that Funston conspired with the other defendants in connection with the act that was the root cause of plaintiffs' alleged injuries." Funston Mem. at 1. DPSU also alleges as an additional ground for dismissal that plaintiffs have failed to allege any conduct against DPSU that is actionable under the antitrust laws. DPSU Mem. at 29-37.

DISCUSSION

I. Motion to Dismiss

When deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6), a court must take all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Ortiz v. Cornetta*, 867 F.2d 146, 149 (2d Cir. 1989). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1943 (1992). The court's consideration on a motion to dismiss is limited to the factual allegations in the complaint; documents incorporated by reference into the complaint; matters of which judicial notice may be taken; and documents either in plaintiff's possession or of which plaintiff had knowledge and relied on in bringing suit. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

II. The Res Judicata Defense

As their first ground for seeking dismissal of plaintiffs' claims, defendants assert that the Complaint is barred by the doctrine of res judicata because it is an impermissible collateral attack on the 1991 rulings of the bankruptcy court.

The doctrine of res judicata rests upon the principle of judicial economy and the public policy favoring certainty in legal relations. *In re Teltronics Servs., Inc.*, 762

F.2d 185, 190 (2d Cir. 1985) (*quoting Comm'r v. Sunnen*, 333 U.S. 591, 597 (1948)). In the Second Circuit, the doctrine of res judicata applies to preclude later litigation if the earlier decision was: (1) a final judgment on the merits; (2) by a court of competent jurisdiction; (3) in a case involving the same parties or their privies; (4) and involving the same cause of action. *Id.* at 190.

In this case, it is clear that the judgment was rendered by a court of competent jurisdiction – the United States Bankruptcy Court for the Eastern District of New York. It also is clear that the bankruptcy court's order approving the sale of Seven-Up Brooklyn to Honickman was a "final judgment." *In re Financial News Network, Inc.*, 931 F.2d 217, 220-21 (2d Cir. 1991) (bankruptcy court's order approving bid for debtor's assets was final order). The order was immediately appealable, but plaintiffs neither appealed the order pursuant to 28 U.S.C. § 158(d) nor moved under Fed. R. Civ. P. 60(b) to vacate the order.

With respect to whether the proceedings before Judge Goetz involved the same parties or their privies, plaintiffs argue that although their counsel on behalf of the Soft Drink Distributors Association was heard on the record, the Association was not an "actual party litigant with full rights." Mem. in Opp. at 2. Plaintiffs also argue that the defendants here were not "parties" to the bankruptcy proceedings. However, because plaintiffs and defendants appeared and were heard at the proceedings before the bankruptcy court, they may be considered "parties" to the sale proceeding for res judicata purposes. *Matter of Met-L-Wood Corp.*, 861 F.2d 1012, 1016 (7th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989); *see also Sanders Confectionary Prods., Inc. v. Heller Financ., Inc.*, 973 F.2d 474, 480-81 (6th

Cir. 1992) (favoring an expansive definition of the term "party" in bankruptcy proceedings), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1046 (1993). Moreover, a proceeding under section 363 of the Bankruptcy Code – which the application before Judge Goetz was – is an in rem proceeding. Such a proceeding "transfers property rights, and property rights are good against the world, not just against parties to a judgment of persons with notice of the proceeding"; this raises an additional bar to plaintiffs' action. *Matter of Met-L-Wood Corp.*, 861 F.2d at 1017.

As to the fourth requirement – that the later litigation involve the same cause of action as the earlier one – a final judgment is res judicata with respect to all claims that were pleaded, "could have been pleaded" or were "necessarily determined" in the first action. *In re Teltronics Servs.*, 762 F.2d at 193. "[T]he test for deciding the sameness of claims requires that the same transaction, evidence, and factual issues be involved. . . . Also dispositive to a finding of preclusive effect, is whether an independent judgment in a separate proceeding would 'impair or destroy rights or interests established by the judgment entered in the first action.' " *Sure-Snap Corp. v. State St. Bank and Trust Co.*, 948 F.2d 869, 874 (2d Cir. 1991) (*quoting Herendeen v. Champion Int'l Corp.*, 525 F.2d 130, 133 (2d Cir. 1975)). New legal theories do not amount to new causes of action sufficient to defeat application of the res judicata bar. *In re Teltronics Servs.*, 762 F.2d at 193.

Defendants argue that the claims raised here were expressly raised in the bankruptcy proceedings and that this action therefore is an impermissible collateral attack on the rulings of the bankruptcy court. In support of their argument, defendants rely heavily on the decision of the

Seventh Circuit in *Matter of Met-L-Wood Corp.*, 861 F.2d 1012 (7th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989). In that case, the bankruptcy court approved the sale of the debtor's assets following a hearing on notice to most of the debtor's unsecured creditors. *Id.* at 1015. Sixteen months later, a newly appointed trustee filed suit in the federal district court alleging, *inter alia*, that the bidding had been rigged and that the defendants had defrauded the unsecured creditors in violation of the RICO Act, other statutes and Illinois common law. *Id.* at 1015-16. In affirming the district court's dismissal of the suit on the ground of collateral estoppel, the Seventh Circuit held:

> No appeal [from the bankruptcy court's] order was taken, however; and after the time for appeal had lapsed, the order could not be attacked in a new lawsuit brought by a party to the sale proceeding or by a successor to that party or by anyone else so far identified with such a party as to be classified as being in privity with him; such a suit would be barred by res judicata. . . .
>
> The unsecured creditors who appeared at the two hearings before [the bankruptcy judge] and urged him first to allow bids for Met-L-Wood's assets to be solicited and then to approve [the] bid were parties to the sale proceeding. They are therefore barred by res judicata from bringing a lawsuit to nullify the sale. (Bringing the suit under RICO could make no difference. RICO is many things, but it is not an exception to res judicata. . . .).

Id. at 1016 (cites omitted). It also bears noting that while the plaintiff trustee did not seek to rescind the sale, the court described his efforts to obtain damages from "the

seller, the purchaser, the purchaser's purchaser . . . a law firm involved in the transaction, and the unsecured creditors that benefited from the sale" as a "thinly disguised collateral attack on the judgment confirming the sale." *Id.* at 1018.

I am persuaded by the reasoning of *Met-L-Wood* that plaintiffs' claims are barred by the doctrine of res judicata. Plaintiffs' claims in this case are based essentially on the same factual issues that they raised before the bankruptcy court; they simply are alleged under theories of antitrust law and tortious interference with contract.[8] Plaintiffs' argument that they have learned new facts subsequent to the bankruptcy proceedings is not persuasive; based on the arguments they made before the bankruptcy court, it is clear that they had adequate information about their claims at that time and that they "*could* have brought these actions in the first instance." *Sure-Snap,* 948 F.2d at 873 (emphasis in original). Moreover, although in response to the arguments of plaintiffs' counsel Judge Goetz observed that "[t]here are other places and other courts where some of these arguments can be made to be more effect [sic] and with more purpose. . . . " (3/5/91 Tr. at 48-49), Judge Goetz clearly considered these arguments in making her determination. *See* DPSU Mem. Ex. 3 at 4 (making findings of fact and

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[8] The bankruptcy court clearly was competent to hear the antitrust claims raised by plaintiffs. *See* 28 U.S.C. §§ 157(a) & 157(b)(2)(O); *In re Financial News Network,* 126 B.R. 157 (S.D.N.Y. 1991) ("The bankruptcy court is legally competent to resolve antitrust issues raised by proceedings before it. . . . ").

entering order "after hearing . . . the Soft Drink Distributors' Association . . . in opposition to the Application [by the debtor for sale of its assets] and after hearing such other persons whose identities are reflected on the transcripts of the record of the Sale Hearings; and after considering all competing offers made for the purchase of the Assets and Inventory. . . . "); *accord Oliner v. McBride's Indus., Inc.*, 412 F. Supp. 490, 493 (S.D.N.Y. 1975) (by finding that settlement of debtor's estate and sale of assets were lawful, Referee in Bankruptcy, district court and court of appeals "necessarily found" that those assets were not misappropriated).

Accordingly, plaintiffs' action is barred by the doctrine of res judicata; in addition, as discussed below, it also must be dismissed for their failure to allege antitrust injury sufficient to confer antitrust standing and for their failure to state a claim for tortious interference with contract.

III. The Antitrust Injury Defense

As their second ground for arguing that plaintiffs have failed to state a claim upon which relief can be granted, defendants argue that plaintiffs' antitrust claims are defective because plaintiffs have failed to allege antitrust injury, and their claims therefore should be dismissed for lack of "antitrust standing."

Section 4 of the Clayton Act allows recovery of treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). Notwithstanding this broad language, the Supreme Court has limited the

class of parties entitled to sue under section 4 and has required potential plaintiffs to demonstrate more than mere "injury in fact." *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 n.3 (1983). Antitrust plaintiffs must demonstrate that they have suffered an "antitrust injury" and that they are otherwise proper plaintiffs to bring suit. *Purgess v. Sharrock*, 806 F. Supp. 1102, 1106 (1992), *supplemented*, 1992 WL 349683 (S.D.N.Y. Nov. 9, 1992) (*quoting Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1449 (11th Cir. 1991); *Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988)).

Noting that the antitrust laws were enacted to protect competition, and not competitors, the Supreme Court has described "antitrust injury" as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488, 489 (1977); *see also Triple M Roofing Corp. v. Tremco, Inc.*, 753 F.2d 242, 247 (2d Cir. 1985). But even if a plaintiff establishes antitrust injury, the court must evaluate other factors in determining whether he or she has "antitrust standing," including:

> (1) the directness of the asserted injury; (2) "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement"; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims of the alleged conduct, in order to avoid duplicative recoveries.

Purgess, 806 F. Supp. at 1107 (*quoting Volvo N. Am. Corp.*, 857 F.2d at 66) (*quoting Associated Gen. Contractors*, 459 U.S. at 540-46)).

I find that plaintiffs have failed to overcome the initial hurdle of alleging antitrust injury. There is substantial authority for the proposition that those in a business relationship with an entity whose failure or acquisition arguably is the result of an antitrust violation lack standing to sue for an injury derivative from or incidental to that business relationship. For example, in *A.G.S. Elecs., Ltd. v. B.S.R., Ltd.*, 460 F. Supp. 707 (S.D.N.Y.), *aff'd*, 591 F.2d 1329 (2d Cir. 1978), the plaintiff was a distributor of record changers and players for a corporation that was purchased by the defendant. Subsequent to the acquisition, defendant controlled virtually 100% of the market for low-end record changers and record players in the United States; defendant also terminated plaintiff's distributorship. *Id.* at 708-09. The court dismissed the plaintiff's antitrust claims due to its failure to allege any causal connection between its injury and the allegedly unlawful acquisition: "[t]he only injuries of which [plaintiff] complains – the loss of profits, promotional expenses and capital expenditures – all flow from the termination of its distributorship rather than any anticompetitive effects of the defendants' acquisition. . . . " *Id.* at 710. *See also Frank Saltz & Sons, Inc. v. Hart Schaffner & Marx*, 1985 WL 2510, at *1, *7-8 (S.D.N.Y. Sept. 5, 1985) (manufacturer of men's suits claimed it suffered antitrust injury when its contract was terminated following acquisition of its distributor; court held plaintiff failed to show antitrust injury "or that its injury [was] sufficiently closely connected to any anticompetitive effects of the acquisition to give [it] standing

to raise the claim" because injury was "merely the result of having been terminated as contractor for the . . . suits.").

Finally, in *Lovett v. General Motors Corp.*, 975 F.2d 518 (1992), *rev'd in part on other grounds*, 998 F.2d 575 (8th Cir. 1993), the owner of an automobile dealership contended that General Motors ("GM") conspired with a rival dealership in violation of the antitrust laws to force his dealership out of business and into bankruptcy. He alleged that as a direct consequence of GM's unlawful acts, he lost his rental income, wages, dividends and cash flow from the dealership; and as a result of this, he "lost virtually everything of value he owned, his personal and business reputation were ruined and deficiency judgments were entered against him." *Id.* at 521. The Eighth Circuit found that although plaintiff undoubtedly had been injured as a result of GM's actions, the injuries were merely a "derivative consequence" of the dealership's injuries:

> None of the injuries were inflicted directly on [plaintiff] by GM's alleged anticompetitive conduct. Instead, the injuries are a direct result of [the dealership's] failure. [Plaintiff's] own explanation of his injuries shows that [the dealership] was the target of GM's anticompetitive activity and that [plaintiff's] injuries are simply an indirect result. In sum, *[plaintiff's] damages are incidental to the alleged antitrust activity and not the type of loss Congress intended to prevent with the antitrust laws.*

Id. (cites omitted) (emphasis added). *See also Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1378 (7th Cir. 1987) ("Merely derivative

injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing.") (cites omitted).

Here, plaintiffs' alleged injuries derive from the loss of their contractual rights as a result of the demise of Seven-Up Brooklyn. Although plaintiffs doubtless have sustained serious injury, they have not shown that the harm to them was the direct result of the defendants' allegedly anticompetitive conduct. Rather, the loss of their contracts and equity distributorships was the direct result of the closing of Seven-Up Brooklyn; as Judge Goetz found, plaintiffs' livelihoods were "lost when this company went into Chapter 11. . . . to the extent that their jobs depend upon the functioning of this company, they lost their jobs." (3/5/91 Tr. at 57-58). Defendants' acts, if anticompetitive, harmed plaintiffs only indirectly. Therefore, plaintiffs have failed to allege antitrust injury "of the type the antitrust laws were intended to prevent," and their claims fail as a matter of law.[9]

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[9] The Supreme Court's decision in *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982), is wholly consistent with the foregoing analysis. In that case, the Court held that a consumer in the market for psychotherapeutic services was injured by her insurer's policy of reimbursing for services provided by psychiatrists, but not by psychologists, because her injury was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the pyschotherapy market." *Id.* at 484. In *Associated Gen. Contractors*, 519 U.S. at 539, the Supreme Court distinguished *McCready* from the situation where a plaintiff is "neither a consumer nor a competitor in the market in which trade was restrained."

Plaintiffs also have asserted claims under the Donnelly Act, N.Y. Gen. Bus. Law § 340. " 'The Donnelly Act – often called a 'Little Sherman Act' – should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in statutory language, or the legislative history justify such a result.' " *Volmar Distribs., Inc. v. New York Post Co., Inc.*, 825 F. Supp. 1153, 1167 n.4 (S.D.N.Y. 1993) (*quoting Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 525 N.Y.S.2d 816, 820, 520 N.E.2d 535, 539 (1988)). Because the Donnelly Act also requires antitrust injury as an element of standing, plaintiffs' claims under the Donnelly Act must be dismissed for all the reasons stated above. *Id.* (*citing Original Appalachian Artwork, Inc. v. Granada Elecs., Inc*, 1986 WL 2402, *4 (S.D.N.Y. Feb. 20, 1986); *Int'l Television Prods. Ltd. v. Twentieth Century Fox Television*, 622 F. Supp. 1532, 1540 n.10 (S.D.N.Y. 1985)).

IV. The Noerr-Pennington Defense

In light of the above conclusion that plaintiffs' action is barred by res judicata and their antitrust claims also must be dismissed for lack of antitrust standing, I will address defendants' argument under the *Noerr-Pennington* doctrine only briefly.

The *Noerr-Pennington* doctrine developed from two Supreme Court cases: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).[10]

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[10] New York recognizes an immunity from antitrust liability analogous to that under the *Noerr-Pennington* doctrine.

Essentially, the doctrine, which is grounded in the first amendment right to petition, exempts from antitrust liability private efforts to influence governmental bodies or the courts, even if for anticompetitive purposes. *Boulware v. State of Nev., Dep't of Human Resources*, 960 F.2d 793, 797 (9th Cir. 1992). The doctrine recognizes a "sham" exception, which encompasses situations where the efforts ostensibly directed to influencing the government or the courts really are a "sham" to cover attempts to interfere directly with business relationships with a competitor. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S. Ct. 1344, 1354 (1991); *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525 (9th Cir. 1991).

Defendants argue that their efforts to obtain the approval of the bankruptcy court and the FTC for the acquisition of Seven-Up Brooklyn's assets fall within the *Noerr-Pennington* exception to the antitrust laws. Specifically, they contend that their alleged dissuasion of potential bidders; DPSU's alleged insistence on full recovery for Seven-Up Brooklyn's breaches of its license agreement; their alleged "sham investigation that showed no qualified buyers"; and their alleged enlisting of the aid of Senators Specter and Bentsen and Representative Schumer to persuade the FTC to approve the proposed acquisition all were intended to cause the bankruptcy court and the FTC to permit Honickman to acquire Seven-

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See, e.g., Rudoff v. Huntington Symphony Orchestra, Inc., 91 Misc. 2d 264, 266, 397 N.Y.S.2d 863, 864-65 (N.Y. Sup. Ct. 1977) (holding that interference with contract pursuant to citizen's right to petition government is privileged and non-tortious).

Up Brooklyn and DPSU to license Honickman as its distributor.

Although defendants' "lobbying" of Senators Specter and Bentsen and Representative Schumer may fall within the ambit of the *Noerr-Pennington* doctrine, I am not convinced that the other acts defendants are alleged to have engaged in were designed to cause the bankruptcy court to permit the acquisition by Honickman and DPSU of the assets of Seven-Up Brooklyn. Rather, defendants' alleged bid-rigging and dissuasion of bidders were direct attempts to influence competitors and only indirectly the bankruptcy court. Furthermore, with respect to at least defendants Honickman and Funston, plaintiffs have alleged a conspiracy to monopolize the carbonated soft drink industry in the New York City area that goes beyond their activities before the court and the FTC.

In short, accepting all allegations in the Complaint as true and drawing all reasonable inferences in favor of plaintiffs' I am not persuaded that the Complaint is barred by the *Noerr-Pennington* doctrine.[11]

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[11] In light of the conclusion that plaintiffs' claims should be dismissed under the doctrine of res judicata and for lack of antitrust standing, it is unnecessary to reach the additional defenses asserted by DPSU and Funston, as described in n.7, *supra*.

V. The State Law Tort Claims

Because plaintiffs also have alleged jurisdiction based on diversity of citizenship,[12] even though this court finds dismissal of plaintiffs' federal antitrust claims appropriate, if the action were not barred in its entirety by the doctrine of res judicata, the court would not be permitted to decline to exercise supplemental jurisdiction over plaintiffs' pendent state law claims pursuant to 28 U.S.C. § 1367(c)(3); *see Benfield v. Mocatta Metals Corp.*, 1992 WL 315323, at *6 (Oct. 19, 1992), *reconsideration denied*, 1992 WL 398388 (S.D.N.Y. Dec. 17, 1992). Accordingly, the court now turns to a discussion of the state law tort claims.

A. Intentional Interference with Contractual Relations

In Count I of the Complaint, plaintiffs allege that defendants intentionally interfered with their exclusive distribution contracts with Seven-Up Brooklyn with the intent to injure plaintiffs. Compl. ¶¶ 72-83. Specifically, plaintiffs allege that defendants intentionally interfered with Seven-Up Brooklyn's performance of plaintiffs' contracts, or that they induced Seven-Up Brooklyn to breach the contracts without justification, as part of a "joint plan" to cause Honickman to acquire the assets of Seven-

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[12] The DPSU defendants allege that diversity may not exist because at least one plaintiff may be a citizen of Pennsylvania and defendant Funston is alleged to be a citizen of Pennsylvania; however, on this motion to dismiss, it is appropriate to assume that diversity jurisdiction exists. *See* DPSU Mem. at 54 n.30.

Up Brooklyn, notwithstanding the consent decree he entered into with the FTC. Compl. ¶ 82.

To state a claim for intentional interference with contractual relations under New York law, a plaintiff must allege: (1) the existence of a valid contract; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the breach of that contract; and (4) damages caused by the breach. *Patel v. Lutheran Medical Center, Inc.*, 753 F. Supp. 1070, 1077 (E.D.N.Y. 1990); *Automotive Elec. Serv. Corp. v. Ass'n of Auto. Distribs.*, 747 F. Supp. 1483, 1507 (E.D.N.Y. 1990). In addition, a plaintiff must allege that " 'there would not have been a breach *but for* the activities of defendants.' " *Sharma v. Skaarup Ship Management Corp.*, 916 F.2d 820, 828 (2d Cir. 1990), *cert. denied*, 499 U.S. 907 (1991) (*quoting Special Event Entertainment v. Rockefeller Center, Inc.*, 458 F. Supp. 72, 78 (S.D.N.Y. 1978)) (emphasis added). Because plaintiffs have alleged the first, second and fourth elements of the tort with respect to all the defendants' the inquiry on this motion to dismiss centers on the third element – whether defendants intentionally procured the breach of plaintiffs' contracts with Seven-Up Brooklyn – and on whether plaintiffs have alleged that defendants were the proximate cause of the breach.

With respect to the causation element, defendants claim that the bankruptcy court's termination of Seven-Up Brooklyn's use of cash collateral on February 27, 1991, was the cause of plaintiffs' injuries. I am persuaded that plaintiffs have not and cannot allege that "but for" defendants' actions, Seven-Up Brooklyn would have performed its contracts with plaintiffs. Plaintiffs' claim for

tortious interference with contractual relations therefore fails on this ground. *Sharma*, 916 F.2d at 828.

With respect to whether defendants intentionally procured the breach by Seven-Up Brooklyn of plaintiffs' contracts, defendants argue that their acts were privileged because "one may protect one's financial interests even if as a consequence thereof the contractual rights of a third party will be injured, provided . . . that one does not employ improper means." *Crigler v. Pennzoil Co.*, 687 F. Supp. 120, 124 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 307 (2d Cir. 1989); *see also Kahn v. Salomon Bros., Inc.*, 813 F. Supp. 191, 195 (E.D.N.Y. 1993) ("Under New York law where a defendant's conduct is intended even partially to advance its own interests, the misconduct must rise to the level of fraudulent or criminal acts."). Honickman and Funston therefore assert that it was, for example, permissible to charge Seven-Up Brooklyn rent for its occupancy of the Melville and Brooklyn facilities and that there was nothing improper about having Seven-Up Brooklyn order products from CDNY, because these acts were done in furtherance of their financial interests. With respect to DPSU, plaintiffs have alleged that DPSU made misrepresentations before the bankruptcy court and withdrew promotional money and advertising from Seven-Up Brooklyn to make it more difficult for Seven-Up Brooklyn and plaintiffs to compete, Compl. ¶ 81; DPSU asserts that its acts were not tortious because they flowed from its right to select its own business relations and to prefer Honickman over Kraus. *See, e.g., Posa, Inc. v. Miller Brewing Co.*, 642 F. Supp. 1198, 1204 (E.D.N.Y. 1986) (recognizing privilege for acts of tortious interference based on right to choose business relations freely).

It is clear that defendants' acts were intended at least in part to protect their financial interests. Indeed, plaintiffs allege only that "one of the purposes" of driving Seven-Up Brooklyn into bankruptcy was to force plaintiffs out of business. Compl. ¶ 89. However, I do not find that plaintiffs can prove "no set of facts" showing that defendants used improper means to advance their economic interests. The New York Court of Appeals has explained that "wrongful means" may include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and *some degrees of economic pressure*; they do not, however, include persuasion alone although it is knowingly directed at interference with contract." *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 632 (1980) (*quoted in Paper Corp. of United States v. Schoeller Technical Papers, Inc.*, 724 F. Supp. 110, 120 (S.D.N.Y. 1989)) (emphasis added). Defendants' acts, as described above, may constitute a degree of economic pressure sufficient to constitute "wrongful means." Nonetheless, in light of plaintiffs' failure to allege "but for" causation, their claim for intentional interference with contract must be dismissed.

B. Interference with Prospective Contractual Relations

In Count II of the Complaint, plaintiffs allege that defendants intentionally interfered with plaintiffs' prospective contractual relations with retailers in their exclusive territories. Compl. ¶¶ 84-92.

> Under New York law, to prevail on a claim of tortious interference with prospective business

> relations, a plaintiff must demonstrate that the defendant interfered with business relations existing between a plaintiff and a third party, either with the purpose of harming the plaintiff or by means that are dishonest, unfair, or improper.

Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988) (*citing PPX Enters. v. Audiofidelity Enters., Inc.*, 818 F.2d 266, 269 (2d Cir. 1987)). "If the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct." *PPX Enters.*, 818 F.2d at 269 (cites omitted). In addition, to state a claim for interference with prospective contractual relations, "the plaintiff must establish that the defendant indeed *interfered* with business relations between plaintiff and a third party." *Marilyn Miglin, Inc. v. Gottex Indus., Inc.*, 790 F. Supp. 1245, 1254 (S.D.N.Y. 1992) (emphasis in original); *accord Volvo N. Am. Corp.*, 857 F.2d at 74-75 (reversing district court's order dismissing tortious interference claim where Volvo alleged requisite interference for the purpose of harming Volvo).

As discussed above, it is evident that defendants' acts with respect to Seven-Up Brooklyn were intended, at least in part, to advance defendants' own economic interests. Therefore, plaintiffs' claim must fail unless they can show that defendants employed "wrongful means" – which include, inter alia, "some degrees of economic pressure" – in interfering with the prospective contracts. *Int'l Minerals and Resources, Inc. v. Pappas*, 761 F. Supp. 1068, 1075 (1991), *reargument denied*, 1991 WL 167267

(S.D.N.Y. Aug. 22, 1991). Again, drawing all inferences in favor of plaintiffs' their allegations may constitute a degree of economic pressure sufficient to state a claim for prospective interference w contract; plaintiffs' claim therefore cannot be dismissed on this ground.

However, I am persuaded that the requirement that a plaintiff show that defendant actually interfered with relations with a third party is fatal to plaintiffs' claim. This requirement was explained in *Marilyn Miglin*, 790 F. Supp. at 1254, where the plaintiff manufacturer claimed that the defendant licensor had tortiously interfered with the manufacturer's prospective relations with stores that would have stocked the licensed product line if production and marketing had continued. The *Miglin* court dismissed the claim because plaintiff alleged no actions taken towards third parties by defendant. *Id.* In this case, plaintiffs have not alleged that defendants took any actions directly towards the retailers with whom plaintiffs previously had dealt. Rather, they allege generally that "[b]y the acts complained of," defendants prevented plaintiffs from entering into contracts with prospective customers. Compl. ¶ 87. These allegations are insufficient to state a claim for interference with prospective contractual relations, and plaintiffs' claim accordingly is dismissed.

CONCLUSION

In sum, plaintiffs' claims are dismissed because they are barred in their entirety by the doctrine of res judicata. Plaintiffs' claims are dismissed for the additional reasons that they have failed to show that they have suffered

antitrust injury sufficient to give them standing under the antitrust laws, and they have failed to state a claim for tortious interference with present and prospective contractual relations.

SO ORDERED.

Dated: Brooklyn, New York
February 7th, 1994

/s/ I. Leo Glasser
I. LEO GLASSER, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

G.K.A. BEVERAGE CORP., STATEN ISLAND BEVERAGE CORP. et al.

Plaintiffs

v.

HAROLD HONICKMAN, DR. PEPPER SEVEN-UP COMPANIES, INC. DR. PEPPER/SEVEN-UP CORPORATION, and LANCE T. FUNSTON

Defendants

93 CIV 2205
(ILG)
Gold, M.

JURY TRIAL DEMANDED

AMENDED COMPLAINT

Plaintiffs, by their attorney, aver as follows:

I. JURISDICTION AND VENUE

1. This is an action for monetary relief arising from the defendants' carrying out the intentional bankruptcy of Seven-Up Brooklyn Bottling Company in order to interfere with plaintiffs' contracts with Seven Up Brooklyn Bottling Company, drive plaintiffs out of business and to evade the antitrust laws, for violation of the antitrust laws of the United States and the State of New York, and for interference with prospective advantage.

2. This Court has jurisdiction under 15 USC 1 et seq., 28 U.S.C. 1331, 1332, 1337 and principles of pendent jurisdiction. The amount in controversy exceeds $50,000 exclusive of interest and costs.

3. Venue is proper under 28 U.S.C. 1391(a) or (b).

II. THE PARTIES

4. Plaintiffs are in part, the following New York corporations and citizens having their principal place of business in this judicial district:

Route 106 Clover Bev. Dist. Corp.	Brooklyn, New York 11229
Route 107 Prince Bev. Dist. Corp.	Brooklyn, New York 11229
Route 112 Gicci Beverage Corp.	Brooklyn, New York 11214
Route 117 V. Iocolano Distribution Corp.	Brooklyn, New York 11214
Route 119 R-Ket Corp.	Staten Island, New York 10312
Route 120 P. Lautato Corp.	Brooklyn, New York 11204

Route 121 Vin-Mare Distribution Corp.	Brooklyn, New York 11214
Route 124 Manuel Nieves Limited	Elmont, New York
Route 125 Vincent Lautato Corp.	Brooklyn, New York 11204
Route 127 Vincent Lautato Corp.	Brooklyn, New York 11204
Route 130 Rockville Distribution Corp.	Rockville Centre, N. Y. 11570
Route 131 Lynvey Beverage Corp.	Roslyn Heights, New York 11577
Route 135 PA Distribution Corp.	Staten Island, New York 10314
Route 141 Starlite Beverage Corp.	Ridgewood, New York 11385
Route 147 Rosario Panebianco	Brooklyn, New York 11209
Route 148 396 6th Avenue Systems Corp.	Brooklyn, New York 11215

Route 158 Rapitz Beverage Corp.	Queens, New York 11761
Route 163 Rinda Beverage Corp.	Brooklyn, New York 11234
Route 172 R&E Wolderich Corp.	Hampton Bays, New York 11946
Route 173 Windy Hills Corp.	Brooklyn, New York 11234
Route 174 Victoria Heights Corp.	Franklin Square, N. Y. 11010
Route 193 Domino Beverage Corp.	Oceanside, New York 11572
Route 433 Staten Island Beverage Corp.	Brooklyn, New York 11232
Route 437 Westerleigh Beverage Corp.	Staten Island, New York 10314
Route 513 Quinco Beverage Corp.	East Williston, New York 11596
Route 516 Rodan Beverage Corp.	Belle Harbor, New York 11569

Route 518 Kare-Fre Beverage Corp.	North Massapequa, N. Y. 11758
Route 520 By Sum Beverage Corp.	Smithtown, New York 11787
Route 522 Breit Distribution Corp.	Elmhurst, L.I., N.Y. 11373
Route 524 Titan Beverage Corp.	Brooklyn, New York 11229
Route 531 Lundon Beverage Dist. Corp.	Howard Beach, New York 11414
Route 535 El-Len Beverage Corp.	East Rockaway, New York 11518
Route 536 Scognamiglio Beverage Corp.	Staten Island, New York 10312
Route 539 Joseph Cauciella, Inc.	Brooklyn, New York 11223
Route 540 Breitinger Distribution Corp.	Bellmore, New York 11710
Route 548 Filmar Distribution Limited	Massapequa, New York 11758

Route 549 J. Mulvey Distribution Corp.	Point Lookout, New York 11569
Route 552 R.A.E. Beverage Corp.	Lynbrook, New York 11563
Route 553 Three Guys Distribution Corp.	Mineola, New York 11501
Route 556 G.K.A. Beverage Corp.	Staten Island, New York 10312
Route 559 Kenneth Steffens Corp.	Syosset, New York 11791
Route 563 John Boehler Corp.	Garden City, New York 11530
Route 565 Roe Beverage Corp.	Maspeth, New York 11378
Route 566 Delta Sigma Corp.	Maspeth, New York 11947
Route 570 Moe's Beverage Corp.	Brooklyn, New York
Route 601 Barbaro 7up Distribution Corp.	Bayshore, New York 11706

Route 603 Gumby Beverage Corp.	Bethpage, New York 11714
Route 608 Big Dan's Beverage Corp.	Bayshore, New York 11706
Route 610 Ballato Beverage Corp.	Nesconset, New York 11767
Route 621 JPM Beverage Corp.	Lynbrook, New York 11563
Route 635 Miller Beverage Corp.	Lynbrook, New York 11563
Route 636 Matty Casamassina Corp.	Plainview, New York 11803
Route 638 Del Beverage Corp.	Westbury, New York 11590
Route 642 Jerijo Corp.	Westbury, New York 11590
Route 650 R.A.E. Beverage Corp.	Lynbrook, New York 11563
Route 664 K & M Beverage Distribution Corp.	Massapequa, New York 11758

Route 666 Ace Metro Beverage Corp.	Massapequa, New York 11758
Route 667 Day Layt Distribution Corp.	Northport, New York
Route 714 Frank Maccorone Corp.	Farmingville, New York 11738
Route 718 Jentine Beverage Corp.	Smithtown, New York 11787
Route 722 F.C.L. Beverage Corp.	Edinburg, New York 12134
Route 723 Twin East Beverage Corp.	Manorville, New York 11949
Route 727 Eugene & Michael Parine Corp.	Riverhead, New York 11901
Route 728 Orlino Beverage Corp.	Shirley, L.I., New York 11967
Route 730 Lar-Tis Ltd. Corp.	Flushing, New York 11354

Route 731 James Quartararo Corp.	Stonybrook, New York 11790
Route 732 Quality Beverage Corp.	Commack, New York 11725
Route 733 M & A Tisbo Limited	Syosset, New York 11791
Route 735 G & C Fava Corp.	Brookhaven, New York 11719
Route 736 P.A.L. Beverage Corp.	Patchogue, New York
Route 742 Albanese Beverage Corp.	Hampton Bays, New York 11946

5. The following plaintiffs, citizens of the State of New York, are individuals, residing in this judicial district:

Route 152 Frank Scarano	Staten Island, New York 10312
Route 155 Joe DeCostanzo	Staten Island, New York 10314
Route 178 Frank Grasso	Staten Island, New York 10314
Route 407 Jerry Bilotti	Staten Island, New York 10305

Route 547 Robert Rich	Deer Park, New York 11729
Route 560 Raymond LeVasseur	Pearl River, New York 10965
Route 567 Mike Christina	New Hyde Park, New York 11040
Route 609 Linda Vitiello Lillian Bagielto Antoinette M. Gambino	Huntington, New York
Route 622 William Rottkamp	Valley Stream, New York 11581
Route 637 Richard E. Miskovsky	Port Jeff. Stat., N.Y. 11776
Route 665 Norman Walmsley	Copiague, New York 11726
Route 713 Conrad Panza	Hampton Bays, New York 11946
Route 715 Nicholas J. Fortuna	Smithtown, New York 11787
Route 721 Frederick J. Ludwig	Edinburg, New York 12134
Route 724 Michael Hubbard	Riverhead, New York 11901
Route 725	Hampton Bays, New York

Conrad Panza	11946
Route 729 Jack Quartararo	Smithtown, New York 11787
Mary Ellen Taffo	Brooklyn, New York 11204
Bart Simone	Lindenhurst, New York 11757

6. Defendant Harold Honickman is a resident and citizen of the State of New Jersey.

7. Defendant DR. PEPPER/SEVEN-UP COMPANIES, INC. is a Delaware corporation with its principal place of business in Dallas, Texas formed in 1988 as a holding company for The Seven-Up Company as well as Dr. Pepper Company.

8. Defendant Dr. Pepper/Seven-Up Corporation is a Texas corporation with its principal place of business in Dallas, Texas. This defendant is a wholly owned subsidiary of Dr. Pepper/Seven Up Companies, Inc. and is successor to the business of The Seven-Up Company following the merger of The Seven-Up Company and Dr. Pepper Company into a new company, defendant Dr. Pepper/Seven-Up Corporation. The parent company and the subsidiary are collectively referred to from time to time herein as DPSU or the DPSU defendants.

9. Defendant Lance T. Funston, is a resident and citizen of the State of Pennsylvania.

FACTUAL BACKGROUND

10. Plaintiffs herein are route owners in a franchised system of soft drink distribution. Each plaintiff owned a route with the exclusive right to distribute 7-Up products

to the retail establishments in their respective franchised geographic territories within the counties of Kings, Nassau, Richmond, Suffolk, and Queens.

11. Each of the plaintiffs was originally a franchisee and distributor solely of the 7-UP line of soft drinks. Seven-Up Brooklyn Bottling Company ("SB"), a manufacturer and bottler of soft drinks, held the regional franchise for 7-Up under license from the predecessor of defendant Dr. Pepper/Seven-Up Corporation. Subsequently in 1985, however, SB requested that the plaintiffs add to their distribution business certain additional licensed merchandise.

12. In the Spring of 1985, SB, through an owner, William Bengen, and the plaintiffs negotiated a contract for the distribution of certain additional soft drinks in exchange for which plaintiffs were guaranteed the right to carry the new products for so long as plaintiffs faithfully performed their distributorship undertakings. The additional products were Perrier, Royal Crown Cola ("RC"), Diet Rite, Hawaiian Punch, A&W Root Beer and Cream Soda, and Nehi.

13. SB guaranteed that the additional lines would not be terminated if the plaintiff franchisees faithfully performed. Each plaintiff owned the rights for his territory and could sell or transfer the rights to a buyer. These routes are known in the industry as "equity" routes and plaintiffs are called "equity distributors."

14. SB further demanded that the cost of acquiring the new line be paid not solely by SB, but also by the plaintiffs herein since it could not afford the line on its own. Because plaintiffs would have a continuing vested

interest in the new soft drink line, plaintiffs agreed to pay the franchise fee to obtain the new franchises for their territories.

15. In 1985 plaintiffs and SB negotiated a subfranchise agreement for the sale of the new line of beverages by plaintiffs in their franchised territories. Pursuant to that agreement, SB would acquire the exclusive right to subfranchise and sell the new products through plaintiff route owners for distribution in the counties of Kings, Suffolk, Richmond, Nassau and Queens. Plaintiffs paid SB a franchise fee in the amount of $.95 per case for the right to distribute the additional soft drinks in the licensed territory. As further consideration for the franchise, plaintiffs agreed to reduce their commissions on SB's 7-Up soft drinks. Thereafter, SB was a regional franchisee as to DPSU and a regional franchisor as to each of the plaintiffs. On information and belief, although DPSU and SB were franchisors, neither registered its franchise with the State Department of Law nor complied in any way with Article 33 of the General Business Law requiring registration statements, audited financial statements, full disclosure prospectus offerings, and prior approval of the Department of Law.

16. In 1977 defendant Harold Honickman purchased a New York corporation known as Kirsch Beverage which made and sold No-Cal and Hammer beverages. In 1980 Honickman's corporation formed a partnership with Canada Dry Bottling known as Canada Dry Bottling Company of New York ("CDNY"). In 1983 Honickman bought out his partner and owned Canada Dry Bottling outright. The preceding year, Honickman had acquired American Beverage Co. and with it the

franchises for Yoo-Hoo, Nedicks, Dr. Brown, Hires and Hoffman carbonated soft drinks.

17. At some time not presently known, Honickman became the owner of Concord Beverage Company, a Pennsylvania corporation which bottles and sells soft drinks under the Vintage brand name and private labels of chain stores and supermarkets such as D'Agostino's, Waldbaum's and Grand Union in New York City, Westchester, Nassau and Suffolk counties.

18. In 1984 Honickman acquired a controlling interest in Pepsi-Cola Bottling Company of New York, Inc. ("Pepsi NY').

19. On information and belief, in 1987 and through to 1991, by virtue of the sales efforts and cash contributions of the plaintiffs, SB controlled at least 11 percent of the carbonated soft drink (CSD) market in Kings, Nassau, Suffolk, Richmond and Queens counties.

20. In 1987 the then current owners of SB, the Bengen family, desired to sell the company. In 1987 SB had a net worth of between ten and fifteen million dollars with sales of approximately $28,000,000. There existed at that time another regional bottler of 7-Up products namely, New York Seven-Up Bottling Company ("NY 7-Up"), whose management wished to purchase SB in order to merge the two operations into an even more efficient and competitive third tier bottler in order to be able to compete with Honickman's growing CSD empire and Coca-Cola in the New York City market. In addition to 7-Up, SB also had the exclusive franchise to the popular Royal Crown Cola or "RC" line of cola carbonated soft

drinks. SB operated out of two plants/warehouses located in Melville and Brooklyn, New York

21. In 1987 when SB became available for purchase, it had total assets or annual net sales far in excess of ten million dollars, and as such, SB could not be lawfully acquired by Honickman without first complying with the notice and waiting period provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The purpose of said statute is to permit the FTC and Department of Justice to analyze a proposed merger's impact on competition before the transaction is consummated and thus allow the government to act to block the acquisition if the federal agency concludes that the merger's impact is anticompetitive.

22. On information and belief, and according to a complaint in *United States* v. *Harold Honickman*, United States District Court for the District of Columbia, Harold Honickman, with intent to evade Hart-Scott-Rodino and knowing full well that his acquisition of SB would violate the antitrust laws of both the United States and the State of New York, concocted along with defendant Funston, an elaborate scheme to conceal his actual personal ownership and control of the shell companies formed to acquire SB. The Honickman plan and the co-conspirators in this arrangement are outlined as follows:

LONG ISLAND ACQUISITION COMPANY

a. Long Island Acquisition Company (LIA) was a partnership formed in July, 1987 by four corporations, namely:

i. Brooklyn Beverage Acquisition Corporation (BBAC) which was managing partner. Honickman owned all of the voting share capital of BBAC.

ii. Partner number two was a corporation owned by Jeffrey Honickman, the son of defendant Honickman.

iii. Partner number three was a corporation owned by Shirley Honickman, the daughter of defendant Honickman.

iv. Partner number four was a corporation owned by defendant Lance T. Funston, a friend and business associate of defendant Honickman.

LIA acquired in July 1987 for $8,800,000 all of SB's non-cola soft drink franchise rights, vehicles, vending machines and related equipment. On information and belief, LIA was capitalized at only $150,000 according to the public records of the Federal Trade Commission. On information and belief, Funston paid nothing for his 48 percent interest in the partnership, having been loaned the money ($72,000) by defendant Honickman through Jeffrey and Shirley Honickman. On information and belief, the 8.8 million dolllars was provided or guaranteed by Canada Dry New York (owned by Honickman).

MELVILLE BEVERAGE PARTNERS L.P.

b. Melville Beverage Partners L.P. was a partnership formed in July 1987 and was composed as follows:

i. The general and managing partner of Melville Beverage was Harold Honickman.

ii. The limited partners of Melville Beverage were his son, Jeffrey Honickman, his daughter, Shirley Honickman and four employees of other Honickman owned companies.

BERRIMAN COZINE CORPORATION

c. Berriman Cozine Corporation was formed in July, 1987. The sole shareholder of Berriman Cozine was one Steven Korman, defendant Honickman's brother-in-law.

THE ACQUISITION ARRANGEMENT

d. On July 31, 1987 or shortly thereafter, SB was sold to four entities:

i. R.C. Acquisition Company, a corporation which, on information and belief, was created by defendant Funston to separately acquire the rights to the SB cola franchise previously licensed by Royal Crown Cola and to keep said cola rights, on paper at least, separate from any owner of Pepsi NY which, under its franchise from the Pepsi-Cola Company, was forbidden to handle another cola soft drink.

ii. LIA (controlled by Honickman via BBAC). LIA bought all of SB's non-cola franchises and plant equipment.

iii. Melville Beverage (controlled by Honickman). Melville acquired the Melville plant for four million dollars although Melville Beverage partnership had a net worth of only $50,000 at the time.

iv. Berriman Cozine Corporation (owned by Honickman's brother-in-law) purchased the Berriman Street building and real estate of SB for five million dollars although, on information and belief, Berriman Cozine had only nominal worth. The entire five million dollar purchase price was borrowed from Continental Bank relying entirely upon the creditworthiness of Honickman and Honickman owned companies.

23. As security for the loan by Continental Bank, said bank took a mortgage on the Berriman Street property. Berriman Cozine, as lessor then leased the property to LIA (managed and controlled by Honickman). Berriman Cozine next assigned the lease to Continental Bank. The latter assignment agreement gave Continental the right to require its tenant, LIA, to purchase the property in which event defendant Honickman via LIA would own it and Continental would in reality look to Harold Honickman for payments of the mortgage. As a result, SB was given the obligation to pay the $56,300 monthly rent for the Berriman Street property.

24. Canada Dry Delaware Valley Bottling Company, is a Pennsylvania corporation owned or controlled by Honickman. It bottles and sells CSD products in Philadelphia. Canada Dry Delaware Valley guaranteed LIA's obligation to purchase the Berriman Street property in the event that Continental demanded that Berriman Cozine (Honickman's brother-in-law) sell the property to LIA. As sole shareholder of the managing partner of LIA, defendant Honickman would manage that property.

25. As to SB's Melville, Long Island bottling plant, Canada Dry New York (owned outright by Honickman

since 1984) gave four million dollars to Melville Beverage Partners Limited Partnership to pay for the purchase. As security for the loan CDNY took a mortgage on the property that Melville Beverage had acquired from SB. Upon purchase, the Melville plant was leased to LIA by Melville Beverage as landlord. LIA was to pay Melville Beverage monthly rent and Melville was to pay CDNY. As a result, SB was given the obligation to pay the $47,000 monthly rent for the Melville plant.

26. On information and belief, the long term goal of Honickman was to transfer the assets of SB especially the right to distribute the popular 7-Up line to Pepsi NY, already owned by Honickman and to shift the other franchises to Canada Dry New York also owned by Honickman.

27. While in control of SB, Honickman appointed Ron Rosenberg of CDNY to run the facility. Rosenberg reported to Dennis Berberich, the chief operating officer of CDNY. Honickman then transferred all SB billing to his Canada Dry New York accounting department which then was put in complete charge of SB's accounts payable and receivable, although to the trade and public, Canada Dry New York was held out to be a competitor of SB. On information and belief, when CDNY was in charge of said SB accounts, from at least July 1987 to December 1988 and possibly into 1989, CDNY appropriated for the benefit of itself substantial promotional allowances paid by Dr. Pepper/Seven Up – which money was supposed to go to SB to help SB market 7-Up products and compete in SB's franchised territory against Pepsi, Coke, and Canada Dry products. For example, if DPSU paid a rebate of fifty cents per case to SB for each case of 7-Up sold in the

territory, that money, supposedly earmarked for 7-Up business, nonetheless would be deposited by CDNY and kept by CDNY.

28. On November 18, 1987 Honickman via BBAC caused SB to borrow four million dollars from Continental Bank secured by SB's accounts receivable, which loan proceeds, on information and belief, went to defendant Honickman or one of his controlled entities. Following the acquisition and at all relevant time periods, SB did no longer owned any real estate, the former SB property was stripped from SB and given to Berriman Cozine and Melville Beverage Partners. SB was relegated to being a tenant in those same buildings.

29. Upon the acquisition of SB by Honickman controlled companies, Honickman switched the most of the bottling operation to his Canada Dry New York company and SB began purchasing from CDNY. At the same time Honickman caused SB to stop ordering product which had previously been bottled for it by New York Seven-Up. On information and belief, in this manner, Honickman created a profit center at his CDNY plant while at the same time dealing a fatal blow to New York Seven-Up which immediately lost its largest customer. The lost business further weakened New York Seven-Up as a competitor of the Honickman controlled companies and made that company less likely to survive. New York Seven-Up is now in bankruptcy and Honickman, in a proceeding before the Federal Trade Commission, is actively seeking to acquire the franchises of that company, aided by the DPSU defendants in furtherance of their conspiracy to monopolize, attempt to monopolize, and to restrain trade in New York City.

30. On information and belief in late 1987, upon learning that SB was sold to the Honickman controlled entities, New York Seven-Up which was a legitimate candidate for purchasing SB and whose acquisition of SB would not have violated the antitrust laws (contrary to Honickman's status) alerted the Federal Trade Commission to Honickman's subterfuge.

31. On information and belief, during 1988 the Federal Trade Commission commenced an investigation of the acquisition and demanded complete information and documents from Honickman relating to the above described acquisition of SB.

32. On information and belief, sometime in late 1988, correctly fearing an imminent lawsuit against him by the Department of Justice or the Federal Trade Commission for violating the antitrust laws and Hart-Scott-Rodino, Honickman decided to sell the assets of SB but in such a way that he could later reclaim SB's 7-Up and affiliated franchises in spite of antitrust obstacles, and in spite of the fact that the plaintiff distributors now had valid and enforceable rights – not only in the original 7-Up line but the RC Cola and those allied brands purchased during the years that the Bengens owned SB.

33. In late 1988 Honickman sold his interest in LIA to to his 48 percent partner, defendant Lance Funston, via a corporation owned by Funston namely, LTF Brooklyn Inc..

34. On information and belief, Honickman sold his interests relating to SB in recognition of his violation of the antitrust laws and Hart-Scott-Rodino.

35. On information and belief, SB then became a partnership composed on LTF 1987-3, Inc. of 1520 Locust Street, Philadelphia, PA and LTF Brooklyn, Inc. of 1520 Locust Street, Philadelphia, PA each owned and controlled by Lance T. Funston. SB retained all prior franchise rights.

36. On information and belief, defendant Funston was until December 1988 a partner of Honickman and had been since at least July 31, 1987.

37. On information and belief, defendant Funston and defendant Honickman had been partners or joint venturers, directly or through controlled entities, in other businesses prior to the sale of LIA.

38. On information and belief, defendant Funston and defendant Honickman were partners or joint venturers, directly or through controlled entities, in other businesses after December 31, 1988.

39. On information and belief, it was defendant Honickman's undisclosed intent and defendant Funston's undisclosed intent that the business of SB would not be run profitably, its assets encumbered or sold and cash siphoned off, and it was their mutual intent (unknown and undisclosed to those outside of the acquisition participants) that such business would fail within a short period.

40. On information and belief, after the sale to defendant Funston, defendant Honickman remained in control of the financial viability of SB in his capacity as a creditor, guarantor of SB loans and lines of credit and the

person having ultimate control of the rentals being paid by SB.

41. On information and belief, defendant Funston had engaged in another 1988 leveraged buyout transaction resulting in the failure of the acquired company (The O'Day Boat Company) and the disposition of the assets of the failed company to creditors after bankruptcy and Funston was capable of causing the same result if made the chief operating officer of SB.

42. On information and belief, the transactions between Funston, Honickman and his controlled corporations and partnerships and possibly other entities, whose relationship to the subject transactions is presently unknown, but all being related to the sale of SB, were designed to lay a foundation for Honickman or one of his controlled companies to return later to re-acquire the identical franchise rights, forbidden under the antitrust laws, by asserting the theory that SB had become a "failing company".

43. On August 1, 1991 Honickman entered into a Consent Order after the FTC commenced proceedings agsinst him for the SB acquisition (Docket No. 9233). The Consent Order precluded Honickman from acquiring interests in soft drink bottlers or franchises with the prior approval of the Federal Trade Commission because of Honickman's power to control the carbonated soft drink market in New York City.

44. Defendant Honickman was sued on October 30, 1992 in the United States District Court for the District of Columbia (*United States of America* v. *Harold Honickman*, 92 Civ. 2436) in a complaint which charged him with a

knowing violation of the Hart-Scott-Rodino Act based on the combination of partnerships and corporations created for the acquisition of SB as described above.

45. On November 2, 1992 defendant Honickman, in a final judgment entered on consent, admitted that the allegations of the U.S. government's complaint "stated a cause of action" and further agreed to pay a fine of 1.9 million dollars.

46. On information and belief, the rental debt imposed by Honickman and agreed to by defendant Funston was about fifty percent higher than fair market value and was a device to drain funds from SB payable indirectly to defendant Honickman. The rental for the Berriman Street facility was $6.62 per square foot plus tax whereas the fair market value was, on information and belief, $4.50. The rental for Melville was $6.25 per square foot plus tax whereas the fair market value was, on information and belief, $4.25.

47. On information and belief, the debt imposed upon by SB as a result of the transactions with defendant Honickman and his controlled companies could not be serviced by SB in the normal course of business and this fact was known by defendants Honickman and Funston.

48. In spite of mounting losses of SB under Funston, consulting fees and interest payments totalling $438,288 were paid to Funston and his wife by SB.

49. Upon information and belief, it was the undisclosed intent of Funston and Honickman to rid (or divest for the benefit of Honickman and his companies) SB of the contractual rights and obligations to the plaintiffs

who collectively had valuable vested rights, (a) by virtue of distribution contracts previously entered into between SB and each of them and (b) because plaintiffs had actually financed, in large part, the purchase of the additional valuable franchises to A&W Root Beer and Cream soda, RC Cola, Diet Rite, Hawaiian Punch, Nehi and Perrier, all of which were exclusively subfranchised to them.

50. For the period during which defendant Funston was managing SB, the company was run deeply into debt and in September, 1989 defendant Funston offered for sale the A&W franchise for resale to Coca-Cola. This sale stripped SB of one of its few unencumbered major assets.

51. The A&W sale was barred by an injunction issued by the Appellate Division, Second Department, as a result of a lawsuit commenced by the plaintiffs. Shortly thereafter, a settlement calling for payments by SB to the distributors by means of future increased commissions was entered into and plaintiffs withdrew the lawsuit. On information and belief, said settlement agreement was entered into by defendant Funston with the intent that SB at his direction, never have to complete its obligations to plaintiffs and with full knowledge that he would later cause SB to file for bankruptcy before SB had to make substantial payments to plaintiffs. The sale was consummated and SB received $7,500,000 from the transaction. On information and belief, the proceeds went in substantial part to pay Canada Dry New York and possibly other Honickman companies.

52. On information and belief, while in control of SB, defendant Funston caused SB to apply for a loan or increased line of credit from Continental Bank of at least

four million dollars to be used by SB. On information and belief, defendant Honickman had established in 1987 or 1988 a prior line of credit for SB and had guaranteed payment to Continental through one of his controlled companies.

53. On information and belief, at some date in 1990 defendants Funston and Honickman had a falling out, following which defendant Honickman either withdrew his guarantee, refused to honor it, purchased an interest in the loan, or used his influence with Continental Bank; one of which caused Continental to cancel the line of credit in September, 1990 in turn causing SB's checks to bounce and bringing about the filing of the petition in bankruptcy.

54. In October 1990 defendant Funston caused a petition in bankruptcy to be filed in the Eastern District of New York (90-71516 E.D.N.Y.).

55. On information and belief, it had been at all relevant times the undisclosed intention of Funston and Honickman to cause the bankruptcy to occur as the means by which Honickman could do what is forbidden by the antitrust laws and his consent judgment – reacquire the 7-Up franchise and related franchises in order to monopolize the carbonated soft drink business in New York City.

56. During the months preceding the filing of the bankruptcy, defendant Funston continuously advised plaintiffs that the business would be maintained and that he would either obtain financing or find a suitable buyer to run the business, knowing full well that it was his intention to ruin the company for the benefit of defendant

Honickman who, in the course of the bankruptcy and FTC proceedings, aided by the DPSU defendants, would emerge as "the only potential purchaser" of the rights.

57. On information and belief, at some time prior to the Bankruptcy hearings conducted before Judge Goetz in February , 1991 defendants Funston, Honickman and the DPSU defendants jointly agreed to inform the bankruptcy court that Honickman was the only qualified purchaser for the rights. Defendants Funston and Honickman agreed between themselves, with the participation of the DPSU defendants, that no others would be considered as successors to SB, the bidding was rigged and the outcome a foregone conclusion.

58. On information and belief, the DPSU defendants withheld pertinent information on potential buyers and fraudulently advised the U.S. Bankruptcy Court, with intent that the Court rely upon such representations, that there were no bidders other than Honickman and Kenneth M. Kraus of Locust Valley, New York nor were there qualified buyers. As so-called proof of this Honickman and the DPSU defendants conducted a sham investigation which showed no qualified buyers. On information and belief there were in fact other interested parties whose identity and correspondence with DPSU were deliberately not disclosed by DPSU or its attorneys.

59. On information and belief, the employees of SB were directed by defendant Funston to tell all parties inquiring into the purchase of SB or its franchise rights that said rights were not available.

60. On information and belief, the employees of SB were directed by defendant Funston to tell all parties

inquiring into the purchase of SB or its franchise rights that said rights would be acquired by defendant Honickman.

61. On information and belief, the DPSU defendants fabricated a claim of liability against SB, claiming that SB had somehow damaged the goodwill of Seven-Up, and advised the U.S. Bankruptcy Court, that any successor to SB would immediately be sued, thus presenting such buyers with the prospect of immediately losing the franchise for which such a buyer would have had just paid or at the very least having to pay one million dollars in damages. On the basis of this threat, the leading bidder, Kenneth Kraus, withdrew his offer during the said Bankruptcy Court hearing whereupon Judge Goetz announced that the Honickman bid was acceptable and that the FTC should consider SB to be a "failing company."

62. On information and belief, it was the joint agreement of Funston, Honickman, and the DPSU defendants that the only bidder for the business who would be permitted under any circumstances to acquire the franchise rights was defendant Honickman through an entity controlled by him.

63. On information and belief, the DPSU defendants have at all relevant times to date imposed on any party inquiring into the franchise rights for New York City, and all territories previously serviced by SB, a franchise acquisition fee not imposed anywhere else or upon any other bottler in the United States. By letters on Seven-Up Company letterhead sent in the U.S. mails, the DPSU defendants have demanded from all potential buyers "The amount you will offer to pay, with a financing plan,

to acquire the 7UP franchises." On information and belief, the intent and purpose of such demands was to prevent any entity other than one controlled directly or indirectly by Harold Honickman from obtaining or even pursuing the franchise rights to New York City, Nassau and Suffolk counties.

64. On information and belief, the undisclosed purpose and intent of the foregoing was to make the argument in Bankruptcy Court, before the Federal Trade Commission, before the U.S. District Court for the District of Columbia, and the Court of Appeals of the District of Columbia that SB was a "failing company" within the meaning of the antitrust case law thus eligible for purchase even by a monopolist such as Honickman.

65. On information and belief, in order to aid them in the conspiracy and scheme to rely on the failing company doctrine, defendants Honickman and DPSU obtained the backing of Senator Arlen Specter of Pennsylvania to pressure the Federal Trade Commission to grant the rights to defendant Honickman.

66. On information and belief, in order to aid them in FTC proceedings defendants Honickman and the DPSU defendants obtained the promise of Senator Arlen Specter, Republican of Pennsylvania, a member of the Judiciary and Appropriation committees of the United States Senate to pressure the Federal Trade Commission to grant the rights to defendant Honickman. By a letter dated October 22, 1992 to the Janet Steiger, Chairman of the Federal Trade Commission, Senator Specter sought approval for his "constituent" although Honickman resided in Loveladies, New Jersey.

67. On information and belief, said U.S. Senator at the urging of defendant Honickman and the DPSU defendants along with then U.S. Senator Lloyd Bentsen, Democrat of Texas, later attempted to cut off appropriations for funding of the soft drink division of the FTC dealing with the Honickman affair in order to assure defendant Honickman unfettered freedom from governmental regulation in maintaining a monopoly share of the carbonated soft drink market in New York City, in spite of the fact that defendant Honickman's companies, with annual sales of 700 million dollars, would then have more than a 60 percent share of that market with the attendant power to control prices and affect competition.

68. On information and belief, in order to aid them in the plan to rely on the failing company doctrine, defendants Honickman and DPSU obtained the backing of Charles E. Schumer, Democrat Brooklyn, of the U.S. House of Representatives, a member of the Judiciary and Budget committees of the House of Representatives. By a letter dated October 22, 1992 to the Honorable Janet Steiger, Chairman of the Federal Trade Commission, Congressman Schumer urged the FTC to move forward to approve Honickman.

69. Upon the failure of New York Seven Up Bottling Company, which serviced Manhattan, Bronx, and Westchester, defendant Honickman in October 1991 filed an application with the FTC to acquire those 7-Up franchises.

70. Said New York Seven-Up bottling company failed in large measure because, on information and belief, Honickman had prevented the merger of it and SB

by his illegal acquisition in 1987 of SB and the later sale to his partner, defendant Lance T. Funston and by terminating its bottling contracts with SB. On information and belief, said merger would have created a viable and financially sound third tier bottler in competition with Pepsi Cola (Honickman) and Coca Cola in New York City as well as Nassau and Suffolk counties.

71. The acts complained of occurred in or affect interstate commerce.

COUNT ONE

72. This is a count for intentional interference with contractual relations under the common law of the State of New York and each and every averment made above and each averment of counts two, three, and four are incorporated by reference as if set forth here in full.

73. There existed from at least 1985 a distribution contract between SB and each of the named plaintiffs under which each of them had the exclusive right to distribute in their respective territories. Said plaintiffs also had a vested right to sell their respective equity routes which often sold for two to four hundred thousand dollars.

74. Defendant Honickman had actual knowledge of the distributorship contracts and negotiated a written distribution contract with plaintiffs while in control of SB.

75. Defendant Funston had actual knowledge of the distributorship contracts with plaintiffs prior to his becoming the chief operating officer of SB and as early as the creation of Long Island Acquisition Company.

76. The DPSU defendants through predecessor companies had actual knowledge of the distribution contracts with plaintiffs since at least the date of the creation of SB.

77. The oral distribution contracts and subsequent written distribution contracts were valid and enforceable at all relevant times and until February 1991 were valuable franchise rights enjoyed by each of the plaintiffs.

78. The said contracts with plaintiffs mandated that plaintiffs purchase all of their soft drinks and other beverages solely from SB and no other source.

79. Each of the named defendants acted intentionally and with the improper motive of bankrupting SB to remove the FTC and antitrust impediments to the acquisition of the 7-Up franchises and related franchises including those separately paid for by plaintiffs.

80. Each of the named defendants acted intentionally and with the improper motive of bankrupting SB to rid that bottler or any successor in interest from having binding contracts with distributors who owned the equity in their protected territories/routes as well as equitable interests in the franchises for RC Cola, Hawaiian Punch, Crush, Barq's Root Beer and Perrier.

81. The DPSU defendants participated in the events complained of by a) falsely alleging in the U.S. Bankruptcy Court that any buyer of the SB business would be liable to them for at least one million dollars for "damaging" the goodwill of 7-Up; b) directly and through their attorneys falsely stating to the U.S. Bankruptcy Court that there were no bidders nor qualified buyers other than Honickman whereas there were other interested parties

any one of which could have qualified with the cooperation of DPSU; c) withdrawing promotional money and advertising from SB in 1990 - 1991 thereby making it more difficult for SB and the plaintiffs to compete against Coca Cola and the Honickman companies.

82. By the acts complained of, defendants and each of them intentionally interfered with the performance of the distribution contracts or induced SB to breach its contracts with plaintiffs without legal or social justification as part of a joint plan to cause defendant Honickman, through one of his controlled companies, to acquire or maintain a monopoly or to gain control of the 7-Up franchise and in spite of the prior consent decree prohibiting such an acquisition.

83. Defendants intended to injure the plaintiffs and plaintiffs have been damaged by the intentional tortious interference with contractual relations which resulted in the destruction of their respective companies and loss of future income in an amount equal to at least $20,000,000.

COUNT TWO

84. This is a count for interference with prospective contractual relations under the common law of the State of New York, and each and every averment made above as well as the averments of counts three, four and five are incorporated by reference as if set forth here in full.

85. Each of the named plaintiffs owned an exclusive territory in which the carbonated soft drinks and other beverages were sold to retailers such as supermarkets, deli's, convenience stores, bodegas, drug stores, and

institutions as well as directly to consumers via vending machines.

86. Each account in the territory of each plaintiff dealt with plaintiff as the sole source of the brands handled during the relevant time periods and each account paid for such goods on a regular basis.

87. By the acts complained of, defendants and each of them prevented plaintiffs from entering into a contract for the sale of carbonated soft drinks and other beverages to prospective customers who had on a regular and continuous basis purchased those goods from the plaintiffs.

88. But for the intentional and unlawful destruction of the business of SB and the improper means employed by defendants, each plaintiff would have made contracts for the sale of goods and derived income from such continuing sales.

89. On information and belief, one of the purposes of driving SB into bankruptcy and the intended transfer of franchise rights to defendant Honickman was to drive plaintiffs out of business or to leave plaintiffs with contracts with a company which no longer had the regional franchises on which plaintiffs depended for survival.

90. The intentional destruction of SB and plaintiffs' businesses was a part of the unlawful restraint of trade in the carbonated soft drink industry in the counties of New York City, Nassau and Suffolk, to eliminate a SB and New York Seven-Up Bottling Company as competitors, to maintain or achieve a monopoly or to control prices and

affect competition in the said industry, to avoid the contractual obligations owed to plaintiffs under their distributorship contracts; and said acts have created and continue an unlawful restraint of trade.

91. The means employed by defendants as described more fully above, are unfair, dishonest, illegal or improper interferences with the prospective contractual relations with their customers.

92. Plaintiffs have been injured and damaged by the tortious interference with the prospective contractual relations in a sum equal to at least $20,000,000 in lost revenues.

COUNT THREE

93. This is a count for violation of the Sherman Act for a conspiracy to monopolize, and each and every averment made above as well as the averments of counts four and five are incorporated by reference as if set forth here in full.

94. By the acts complained, defendants Honickman, Funston, and DPSU (and possibly Berriman Cozine, BBAC, LTF Brooklyn, RC Acquisition Corp., and Melville Beverages Partners) have combined or conspired among and between themselves to eliminate SB as a competitor, to eliminate plaintiffs as competitors, to eliminate New York Seven-Up Bottling Company as a competitor and to transfer the 7-Up franchise to a Honickman controlled company.

95. Each of the named defendants had a specific intent to monopolize, carried out through overt acts in

furtherance of their conspiracy including: the illegal acquisition of SB, the intentional destruction of SB, the termination of contracts between SB and New York Seven-Up Bottling Company, the transfer of the 7-Up franchise to a Honickman controlled entity after destroying SB, conduct to ensure there were no other bidders for SB, rigging the outcome of the bankruptcy proceeding, and creating a situation in which Honickman and the DPSU defendants would claim that the acquisition of those franchise rights qualified under the failing company exception to the antitrust laws. Said acts occurred in or affect interstate commerce.

COUNT FOUR

96. This is a count for violation of Section 340 the New York General Business Law and each and every averment made above as well as the averments of count five, and including, without limitation product market and geographic market are incorporated by reference as if set forth here in full. This count is pleaded additionally to the federal antitrust counts.

97. On information and belief, by the acts above alleged, defendants have conspired, agreed, combined or made an arrangement to create or maintain a monopoly in the conduct of the carbonated soft drink business in the City of New York at the bottler level or at the distribution level or both.

98. On information and belief, defendants' conduct has restrained competition or may restrain competition in the carbonated soft drink business in New York City at the bottler level or at the distribution level or both.

99. On information and belief, by the acts complained of, defendants have established or maintained a monopoly in the carbonated soft drink business at the bottler level or at the distribution level or have unlawfully interfered with the plaintiffs' free exercise of their business activities in the furnishing of their services in the State of New York or both and defendants have restrained plaintiffs' trade in the sale of carbonated soft drinks.

100. The purpose of defendants' actions in destroying SB, destroying plaintiffs' businesses and creating the false appearance that SB was a "failing company" was to restrain competition in the CSD market in New York City or to establish a monopoly in said industry in the relevant market by:

a) eliminating SB as a competitor;

b) eliminating plaintiffs as competitors at the distributor level;

c) eliminating New York Seven Up Bottling Company as a competitor; and

d) increasing, by unlawful means, the franchises controlled by defendant Honickman and the attendant market share and market power of Honickman and the DPSU defendants.

101. It was the undisclosed intent of the defendants, to recapture the 7-Up franchise rights for the benefit of Honickman and the DPSU defendants in the course of this arrangement, but to do so without contractual, legal and equitable obligations to plaintiffs by causing the financial ruin of SB and the elimination of plaintiffs as distributors and competitors.

102. Defendants' arrangement and agreement enervates free competition and creates or may establish a monopoly in the carbonated soft drink market in New York City.

COUNT FIVE

103. This is count for violation of the antitrust laws of the United States, 15 U.S.C. 2, an attempt to monopolize, and each and every averment made above as well as the averments of counts five and five [sic] are incorporated by reference Das if set forth here in fuff.

104. On information and belief, defendant Honickman, by virtue of his ownership of Pepsi NY, CDNY, Kirsch Beverages, and possibly other bottlers, franchises or brands, controls over 60 percent of the carbonated soft drink market in New York City.

105. On information and belief, defendant Honickman, by virtue of his ownership of Pepsi NY, CDNY, Concord Beverages, Kirsch Beverages, and possibly other bottlers, franchises or brands, controls over 60 percent of the carbonated soft drink market in New York City. On information and belief, in addition to the brands franchised by Pepsi NY and CDNY, Honickman is the largest bottler of private label carbonated soft drinks and manufactures and bottles for Pathmark, Grand Union, Key Food, D'Agostino's, Waldbaums and A&P, among others.

106. On information and belief, the Honickman controlled companies in the aggregate make Honickman the 9th largest bottler of non-alcoholic beverages in America and said companies' East Coast regional sales, in excess

of seven hundred million dollars, are greater than all of the national sales of the DPSU defendants.

107. On information and belief, Honickman controls in New York City at least 50 percent of the carbonated soft drink market (excluding 7-Up brands) and 64 percent of that market when 7-Up brands are included.

108. Defendant Honickman's controlled companies, in addition to being bottlers also distributed carbonated soft drinks in competition with plaintiffs at all relevant time periods through company owned trucks.

109. The product market for purposes of the anti-trust averments made herein is carbonated soft drinks.

110. On information and belief, the combined market shares of the Honickman controlled companies and Coca-Cola Bottling Company of New York, the regional franchisor of Coca-Cola, equals 95 percent of the carbonated soft drink market in New York City.

111. The Federal Trade Commission concluded that the carbonated soft drink market in the relevant geographic market was a duopoly consisting of Coke and Pepsi/Honickman brands and that the acquisition of the 7-Up franchise by Honickman "would likely result in the entrenchment of an enduring duopoly.". On appeal to the U.S. District Court for the District of Columbia, that characterization was found to be reasonable and not arbitrary nor capricious.

112. By the acts complained of, defendant Honickman, aided by DPSU defendants and Funston attempted to monopolize the carbonated soft drink market in New York City, in at least the following ways:

a. Anticompetitive and exclusionary conduct in the illegal acquisition and sale of SB; termination of New York Seven-Up bottling contracts, a concerted plan to ruin SB financially; false statements made to the U.S. Bankruptcy Court and reliance upon the failing company doctrine when said failure of SB was attributable in substantial part to the defendants; the attempt to coerce the FTC by political influence based upon false information and misrepresentations of the facts and concealing the fact that Honickman and Funston brought about the failure of SB; the elimination of SB as a competitor; cutting off the purchases made from New York Seven-Up Bottling Company, the elimination of plaintiffs as equity owners of their routes and the placing of their formerly franchised products for sale by Honickman controlled companies.

b. The specific intent of defendant Honickman and the specific intent of the DPSU defendants to monopolize in the carbonated soft drink market as shown by the conduct of Honickman in the acquisition and sale of SB, strapping SB with unserviceable debt while controlling SB financially, and the participation of the DPSU defendants and Funston in eliminating buyers for the SB franchise rights.

c. The dangerous probability that the defendant Honickman will control permanently at least 64 percent of the carbonated soft drink market in New York City.

113. In the course of their combined efforts to first destroy SB and then to acquire and maintain the 7-Up franchises, defendants and each of them have injured plaintiffs in their business or property or both in that

their respective businesses have been destroyed and they have lost the profits reasonably anticipated from the normal course of their businesses.

JURY DEMAND

114. Plaintiffs demand a trial by jury on all issues so triable.

WHEREFORE, plaintiffs demand judgment as follows:

1. On Count One damages in the sum of twenty million dollars and that the Court in the exercise of its discretion award exemplary damages of treble such damages.

2. On Count Two damages in the sum of twenty million dollars and that the Court in the exercise of its discretion award exemplary damages of treble such damages.

3. On Count Three damages in the sum of twenty million dollars and that pursuant to 15 USC 15 such damages be trebled and that plaintiffs be awarded their reasonable attorneys fees.

4. On Count Four damages in the sum of twenty million dollars and that the Court in the exercise of its discretion award exemplary damages of treble such damages.

5. On Count Five damages in the sum of twenty million dollars and that pursuant to 15 USC 15 such damages be trebled and that plaintiffs be awarded their reasonable attorneys fees.

6. That defendants Honickman and Funston be permanently enjoined from owning directly or indirectly any company which bottles or sells any Dr. Pepper/Seven-Up franchised soft drinks.

7. That defendants Honickman and Funston by virtue of their intentional wrongful conduct be permanently enjoined from owning directly or indirectly any company which sells any of the goods formerly distributed by plaintiffs namely, Perrier, Royal Crown Cola ("RC"), Diet Rite, Hawaiian Punch, A&W Root Beer and Cream Soda, Barq's, and Nehi.

That plaintiffs recover their costs and prejudgment interest from October, 1990.

Dated: November 1, 1993

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STATUTES INVOLVED

Section 1 of the Sherman Act, 15 USC 1 states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 2 of the Sherman Act, 15 USC 2, makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . . . "

15 USC 15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . .

Section 340 of the New York General Business Law reads: "Sec. 340. Contracts or agreements for monopoly or in restraint of trade illegal and void

1. Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free

exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void."

Rule 12(b)(6) of the Federal Rules of Civil Procedure governs a motion to dismiss and reads:

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which

relief can be granted. . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.